TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 74.

GEORGE E. ZARTMAN, TRUSTEE IN BANKRUPTCY OF FRANCIS BACON, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF WATERLOO, NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED FEBRUARY 15, 1908.

(21,019.)

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a Filed Oct. 3, 1906.

STATE OF NEW YORK:

Court of Appeals.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y., Respondent,
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon, Appellant.

Case on Appeal.

Frederick L. Manning, Waterloo, N. Y., Attorney for Appellant.
Hammond & Hammond, Seneca Falls, N. Y., Attorneys for Respondent.

Filed Oct. 3, 1906.

1 Supreme Court, Appellate Division, Fourth Department.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y., Respondent,
vs.
GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon, Impleaded with FRANCIS BACON, Appellant.

This action was begun by the First National Bank of Waterloo, N. Y., as plaintiff against Francis Bacon and against George E. Zartman as Trustee in Bankruptcy of Francis Bacon, defendants, by the service of the summons and complaint on said defendants on the 17th day of October, 1904; the answer of defendant Zartman as Trustee was served on November 9th, 1904. There has been no change of parties.

Summons and Complaint.

STATE OF NEW YORK:

Supreme Court, Seneca County.

THE FIRST NATIONAL BANK OF WATERLOO
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon.

2 To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this Summons, exclusive of the day

of service and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Seneca.

HAMMOND & HAMMOND,
Attorneys for Plaintiff, Seneca Falls, N. Y.

Dated this 12th day of October, 1904.

Supreme Court, Seneca County.

FIRST NATIONAL BANK OF WATERLOO
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon.

The above named plaintiff for its complaint in this action respectfully shows to the court:

I.

That the plaintiff is a domestic corporation organized under the laws of the United States for the purpose of doing a banking business and that at all the times hereinafter named it was engaged in the business of Banking at Waterloo, Seneca County, N. Y., in and by its corporate name given in the title to this action.

3 That on or about the 4th day of May 1904, the above named, Francis Bacon, was duly adjudicated a bankrupt upon his own petition, in the District Court of the United States for the Western District of New York, in a proceeding then pending in said court entitled "in the Matter of Francis Bacon, Bankrupt, in Bankruptcy No. 1782"; and that on or about the 23rd day of May 1904, the above named defendant George E. Zartman was duly appointed, and soon thereafter duly qualified to act as, the trustee of the estate of the said bankrupt and that he still continues in office as such trustee.

II.

This plaintiff further alleges that on or about the 15th day of February, 1902, the said Francis Bacon was a stock holder in and a director and president of the plaintiff herein and that on or about the said 15th day of February 1902, and prior thereto, he was and had been the owner of four hundred sixty one shares of the capital stock of the Waterloo Wagon Company Limited and also of two hundred fifty three shares of the capital stock of the said First National Bank of Waterloo as more fully set forth in the paper or agreement in writing, a copy of which is hereunto annexed and marked No. 1.

This plaintiff further shows that the said written agreement or paper, schedule No. 1, hereunto annexed, was signed, executed and delivered at or about the time it bears date and that the same was intended to be executed and made in accordance with the agreement then entered into between the said First National Bank and Francis

Bacon; and that it was believed by the parties to the said instrument that the same was made and executed according to the agreement that had been made and entered into between the said First National Bank of Waterloo and the said Francis Bacon.

Plaintiff further shows that the real agreement between
4 the said parties, the said First National Bank of Waterloo and the said Francis Bacon, was, that the certificates of stock which are described in the said schedules No. 1, should be transferred to the First National Bank of Waterloo, subject to the rights of the Exchange National Bank of Seneca Falls, N. Y., as a continuing collateral security for the payment to the said First National Bank of Waterloo of any indebtedness or liability of any kind absolute or contingent then existing, or that might thereafter exist, and accrue, or to be contracted on the part of the Waterloo Wagon Company Limited, or the said Francis Bacon, to said bank, and that when the said shares of capital stock should be surrendered by the said Exchange National Bank they should be deposited with the said First National Bank of Waterloo.

This plaintiff alleges that such was the actual and true agreement and understanding between the parties to the said written instrument and that each supposed that the said written instrument correctly expressed the true meaning and agreement of the parties, and that it contained a statement that the said shares of capital stock were to be transferred to and held by the said First National Bank of Waterloo subject to the rights of the Exchange National Bank of Seneca Falls, N. Y., as a continuing collateral security for the payment of any and all indebtedness and liability of every kind absolute or contingent, then or thereafter existing or arising in favor of said bank and against the said Francis Bacon, as well as against the said Waterloo Wagon Company Limited.

This plaintiff further alleges, that in writing out or drafting the said agreement certain words and parts thereof were by the omission of the draughtsman and mutual mistake of the parties thereto omitted therefrom so that the said agreement did not and does not express the true agreement and understanding between the parties by reason of such mistake and omission.

5 This plaintiff further shows that the fact of such mistake and omission was not known to the plaintiff and, upon information and belief, that it was not known to the said Francis Bacon until after his adjudication in bankruptcy, as a bankrupt, and the same was first brought to the attention of this plaintiff and as the plaintiff is informed and believes, to the attention of the said Bacon, when the plaintiff was looking over and examining its securities and collaterals received by it from the said defendant Bacon, which were or might be affected by his adjudication as such bankrupt.

This plaintiff further shows that annexed hereto is a draft, marked schedule No. 2, of a writing which shows the actual and true agreement made and entered into by the said First National Bank and said Bacon on or about February 15th, 1902, which was intended to be expressed in the same written instrument, a copy of which is hereunto attached as schedule No. 1.

This plaintiff further alleges that it brings this action in the equity side of the court and not as an action at law, because it does not and can not have any adequate remedy in an action at law.

Wherefore the plaintiff asks judgment that the said written instrument a copy of which is hereunto annexed, and marked schedule No. 1, be reformed and corrected so as to explain the true agreement and understanding and intention of the parties thereto; and that the same may be so corrected and reformed as to read as — forth in schedule No. 2, attached to this complaint; and that the plaintiff may have other or further relief in this action as shall be just and equitable.

HAMMOND & HAMMOND,
Attorneys for Plaintiff, Seneca Falls, N. Y.

6 STATE OF NEW YORK,
County of Seneca, ss:

Herbert R. Becker being duly sworn says that he is the cashier of the plaintiff in this action that he has read the foregoing complaint and knows the contents thereof; and that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged on information and belief, as to those matters he believes it to be true.

HERBERT R. BECKER.

Sworn to before me this 17th day of October, 1904.
W. K. DENNISTON,
Notary Public.

SCHEDULE No. 1.

FEBRUARY 15, 1902.

This is to certify that Mr. Francis Bacon of Waterloo, N. Y., has deposited with the Exchange National Bank of Seneca Falls, N. Y., the following property:—

461 shares of the capital stock of Waterloo Wagon Co., Ltd. represented by the following certificates, viz.:

No.	49	for 110	Shares;	No.	75	for 106¼	Shares
"	50	for 5	"	"	102	for 5	"
"	54	for 57½	"	"	104	for 111¼	"
"	74	for 50	"	"	130	for 16	"

253 shares of stock of the First National Bank of Waterloo, N. Y., represented by the following certificates, viz:

7

No.	188	for 50	Shares;	No.	191	for 50	Shares
"	189	for 15	"	"	192	for 28	"
"	190	for 25	"	"	204	for 85	"

to be held by said Bank, as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, due or not due, now existing or that may hereafter exist, arise, accrue or be contracted, on the part of himself or of the Waterloo Wagon Co. Limited, to said Bank, and the said Francis Bacon hereby agrees with the First National Bank of Waterloo that the said certificates of Stock above named may be held by the said First National Bank of Waterloo as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent that may hereafter exist, arise, accrue or to be contracted on the part of the Waterloo Wagon Company Limited to said bank and said shares of Stock upon their surrender by the Exchange National Bank shall be deposited with the said First National Bank of Waterloo.

FIRST NATIONAL BANK OF WATERLOO,
By H. R. BECKER, *Cas.*
FRANCIS BACON.

SCHEDULE No. 2.

FEBRUARY 15, 1902.

This is to certify that Mr. Francis Bacon of Waterloo, N. Y., has deposited with the Exchange National Bank of Seneca Falls, N. Y., the following property, viz:

8 161 shares of the capital stock of the Waterloo Wagon Co. Limited, represented by the following certificates, viz:

No.	49	for	110	Shares;	No.	75	for	106¼	Shares
"	50	for	5	"	"	102	for	5	"
"	54	for	57½	"	"	101	for	111¼	"
"	74	for	50	"	"	130	for	16	"

253 shares of the stock of the First National Bank of Waterloo, N. Y., represented by the following certificates, viz:

No.	188	for	50	Shares;	No.	191	for	50	Shares
"	189	for	15	"	"	192	for	28	"
"	190	for	25	"	"	204	for	85	"

to be held by said bank as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, due or not due, now existing or that may hereafter exist, arise, accrue or be contracted, on the part of himself or of the Waterloo Wagon Co. Limited, to said bank, and the said Francis Bacon hereby agrees with the First National Bank of Waterloo, that the said certificates of stock above named are transferred to and may be held by the said First National Bank of Waterloo as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent now existing or that may

hereafter exist, arise, accrue or be contracted on the part of the Waterloo Wagon Co. Limited or himself to said bank and said shares of stock upon their surrender by the Exchange National Bank shall be deposited with the said First National Bank of Waterloo.

FIRST NATIONAL BANK OF WATERLOO.
By H. P. BECKER, *Cas.*
FRANCIS BACON.

9 *Answer.*

Supreme Court, Seneca County.

THE FIRST NATIONAL BANK OF WATERLOO
vs.
GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon, Impleaded with Another.

The defendant George E. Zartman as trustee in bankruptcy of Francis Bacon answers the complaint herein as follows:

First. The defendant admits the allegations contained in folios one, two and three of the complaint.

Second. The defendant denies that he has any knowledge or information sufficient to form a belief as to the time when said written agreement or paper marked Schedule No. 1, described in and annexed to said complaint, was executed and delivered.

Third. And upon his information and belief, defendant denies each and every other allegation in said complaint contained.

Fourth. And for a further answer and defense, defendant alleges that prior to the adjudication of bankruptcy of the said Francis Bacon, several judgments were recovered against the said Francis Bacon in the Supreme Court of the State of New York, and that upon the return of an execution unsatisfied upon one of said judgments, such proceedings were duly had before the County judge of the County of Seneca, that one George F. Bodine was duly appointed the receiver of the property of the said Francis

10 Bacon; that said receiver duly qualified, and the rights of the said judgment creditor and of the said receiver became fixed, before said adjudication in bankruptcy, in the property of the said Francis Bacon; that said several judgments remain wholly unpaid, and have been proved as claims against the estate in bankruptcy of the said Francis Bacon; and that the rights of the said judgment creditor are now represented by this defendant.

Wherefore defendant asks that the complaint herein be dismissed with costs.

FREDERICK L. MANNING,
Attorney for Defendant.

Office & P. O. Address, Waterloo, Seneca Co., N. Y.

STATE OF NEW YORK,
County of Seneca, ss:

George E. Zartman, being duly sworn, says he is the defendant named in the above entitled action; that the foregoing answer is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

GEORGE E. ZARTMAN.

Sworn to before me this 9th day of November, 1905.

F. G. STEWART,
Notary Public.

This action was tried on the 20th day of February, 1905, at an adjourned Equity Term, at Waterloo, N. Y., before Hon. James A. Robson, one of the Justices of the Supreme Court, without a jury.

11 J. N. Hammond, Esq., appeared for the plaintiff, and F. L. Manning, Esq., appeared for defendant Zartman, as Trustee, who also appeared as attorney in person.

The following contains and constitutes all the evidence and all the proofs given on the trial of the said action.

Mr. Zartman moved to dismiss the action upon the complaint, for two reasons:

First. That the complaint does not state facts sufficient to constitute a cause of action.

Second. That the complaint does state facts which constitute a complete bar to the action and the recovery sought.

Motion denied with leave to renew at the close of the evidence.

The following witnesses were called by and testified on behalf of the plaintiff.

HERBERT R. BECKER, being duly sworn, testified as follows:

To Mr. HAMMOND:

I am the cashier of the First National Bank of Waterloo, and have been continuously since 1899. I was acting as such cashier in February 1902. At that same time the defendant Francis Bacon was the president of the First National Bank. He had been president of that bank for a number of years. I cannot give the date when his presidency of that bank ceased. I think it was two years ago, year ago last January, January 1903, I think. Mr. Bacon was also a stockholder of the First National Bank, to a large extent. At that time he owned 283 shares, I think; 28 shares more than the

12 amount named in that assignment. Mr. Bacon had at times before that borrowed money from the bank, and given his notes.

Q. And after February 15, 1902, did the bank also lend to Mr. Bacon money and take his notes?

Mr. Zartman objected. There is no allegation in the complaint in any way of any obligation or transaction between this plaintiff

and the defendant. Objected to the introduction of the evidence as incompetent and immaterial.

Mr. HAMMOND: It is not introduced as the most material evidence. It is collateral to show the relations out of which this agreement sprang.

The COURT: Your objection is, it is not within the pleadings.

Mr. ZARTMAN: Yes, sir.

Received and exception.

A. Yes, sir.

The bank held notes of Mr. Bacon at the time of the commencement of this action.

Q. You may state what amount?

Mr. Zartman objected as not being within the pleadings.

Received and exception.

A. It held one note of $1010, bearing interest. $1010, was the face of the note. I do not believe I can give accurate amounts of another note. I think there was another note of four hundred and odd dollars, besides the interest. These questions relate to the beginning of this action. One of $200, and another of, approxi-
13 mately, eight hundred dollars. Each of these sums that I have given is the amount of the principal aside from the interest. And the bank still holds those notes except the first one named, except the four hundred and odd dollar note. That has been paid, or partially paid. The subject of the execution of this agreement of February 15, 1902, arose principally through the bank examiner, and in talks in our Board of Directors in regard to the paper of the Waterloo Wagon Company and Francis Bacon which our Board and the examiner thought should be further secured, and they were. Mr. Bacon agreed to assign to our bank his bank stock and his wagon company stock subject to a lien of the Exchange National Bank of Seneca Falls on the same as a collateral to his loan with the bank and the Wagon Company's loan and any other loans which might arise. The agreement finally culminated in a writing. (Writing produced by witness.) The conversations that culminated in this agreement was between Mr. Bacon and myself. I think Mr. Bacon also had conversation with the examiner regarding it himself, though I am not sure about that. Mr. Bacon and I did talk the matter over between ourselves; I representing the bank. The talk that Mr. Bacon and I had on that subject was, practically, that Mr. Bacon admitted that this paper should be further secured; that he should do what he could to secure it, and he was willing to do so, and he also expressed his willingness to execute such papers as might be necessary to make the bank feel secure, but this was not done. It was put off and neglected until finally this paper was made by Mr Bacon and delivered to me. There were a number of conversations had upon the subject. In the course of those conversations Mr. Bacon informed me as to the number of shares of stock that he could turn out. That was 253 shares of the stock of the bank, and I do not recollect the number of shares of the Wagon Company stock, 161, as I remember it. It was said between us that that should

be turned out as security for all liabilities of the Waterloo
14 Wagon Company, or Mr. Bacon himself, which already existed or might be thereafter made to the First National Bank of Waterloo. The stock was well understood to be at that time in the hands of the Exchange National Bank of Seneca Falls. And has remained there ever since that time. Mr. Bacon prepared this agreement. I understood that it was done at the Wagon Company's office by his stenographer. At that time Mr. Bacon was also president of the Waterloo Wagon Company, and his time was spent almost entirely at the office of the Waterloo Wagon Company. He did not give his personal attention, day after day, to the matters at the bank. After he prepared it he brought it to me, for signature; and I signed it for the bank. Then Mr. Bacon signed it. The signatures appearing upon this paper are the genuine signatures of Mr. Bacon and myself. At that time I believed that this paper covered the indebtedness of Mr. Bacon as well as of the Wagon Company to the First National Bank of Waterloo. I do not know the dates when I first discovered that it did not. It was sometime after that Mr. Bacon had been adjudicated a bankrupt. I showed the contract to Mr. Zartman and he called my attention to the fact that it did not cover what we claimed it did. I do not remember about when it was. It was shortly after the adjudication in bankruptcy. Up to that time I had believed the contract did cover his indebtedness as well as that of the Wagon Company. The agreement between Mr. Bacon and myself was that it should cover present and future indebtedness. And up until that time I believed that it did also cover present and future indebtedness. I learned from Mr. Zartman, or I learned that Mr. Zartman would claim that this contract did not cover any indebtedness of Mr. Bacon to the bank. I understood that he took that position as trustee in bankruptcy of Mr. Bacon. And after that this action was commenced.

Mr. Hammond offered the contract in evidence.

Received and marked Exhibit 1. I. C. H. February 20, 1905.

15 To Mr. ZARTMAN:

My first conversation with Mr. Bacon about this agreement was at least a year, and I think nearly two years before the agreement was made. The agreement was made at its date, in February, 1902, I think it is. I did not say I had any particular talk with Mr. Bacon a year or two before that time. I had several talks with Mr. Bacon extending at least over a year. Previous to that time the bank examiner had called my attention to this matter and asked me to get security. And yet I delayed getting this agreement at least a year after I began talking with Mr. Bacon about it. The examiner asked me about it during that time every time he came, and he came twice a year. I think it was only twice a year in those days. I presume he first saw this agreement on his first visit after it was made. It was shown to him every time he came. The number of times he examined this agreement, or saw it before the bankruptcy of Mr. Bacon depends on how many examinations were made. One of the examiners saw it each time an examination was made. They would

average twice a year. I don't think the examiner has not examined that bank four times a year since that document was made. I think not since 1902. Mr. Graham and Mr. Van Vranken were the examiners there. I do not know how many times Mr. Graham has examined our bank and seen that contract since I have had it, every time he has been in the bank. It was Mr. Graham that asked me to get that security. He has looked at that agreement. I do not know how carefully, when he was examining the other collaterals of the bank.

Q. You would have the Court understand that Mr. Graham insisted that you should get collateral for Mr. Bacon's individual indebtedness, and that he saw this contract a number of times since you have had it, and never said anything further about Mr. Bacon's collateral?

A. He never did.

15 Q. At the time of Mr. Bacon's bankruptcy in 1904, the bank did not hold any claims of any kind against the Waterloo Wagon Company?

A. I do not know whether that is true or not.

Q. Didn't you so testify on the other hearings?

A. Possibly. It may be I did.

Q. You do not know?

A. No, sir.

Q. And did not at the time of the commencement of this action?

A. I think not.

I do not know whether Mr. Graham has examined this contract since the bankruptcy of Mr. Bacon.

Q. He has examined your bank since last May; if he has, he has seen that contract?

A. Whether he has made any particular examination of it or not, I do not know.

Q. What were the obligations of Mr. Bacon that the bank examiner wanted security for?

A. All of Mr. Bacon's paper which we held.

Q. The talk with the examiner was principally of the Waterloo Wagon Company's paper, and only incidentally of Mr. Bacon's paper?

A. It was principally to secure his endorsement on the Waterloo Wagon Company's papers.

Q. He was an endorser on the Waterloo Wagon Company paper?

A. He was guarantor.

Q. The bank held for the Wagon Company's paper a bond signed by a number of parties as guarantors, did it not?

A. They did, and Mr. Bacon for one.

17 Q. You say it was principally to secure Mr. Bacon's liability on that bond that the examiner wanted Mr. Bacon's——

Mr. HAMMOND: I object. He did not say so.

Q. Then the talk with Mr. Graham was to secure the Waterloo Wagon Company's paper and to secure Mr. Bacon's obligations on that guaranty bond?

A. It was to secure Mr. Bacon's obligations to the First National Bank of Waterloo of every kind and nature.

He was also at that time guarantor for the Waterloo Water Company. The bank held a three thousand dollar note of the Waterloo Water Company. That note was given October 2, 1894. It was renewed for four months April 30, 1895, by the payment of interest and marked "renewed." (Note produced by witness.) I think that note was carried as a note in the loans of the First National Bank of Waterloo at the time of the beginning of these conversations with Mr. Graham. It never ceased to be a loan in the loans of the First National Bank of Waterloo. It is one now, that is, a renewal of that note is, or, rather, a note given by Mr. Bacon to take up that note. This note was not counted in the reported loans of the First National Bank at any time within the last two or three years covered by this time. It is not now carried in the loans of the bank. That particular note has been taken up by another note. This particular note was credited up to the loan account of the First National Bank April 9, 1901. I think there has been no payments upon this note from the time of the endorsement of interest on April 30, 1895, up to the time it was credited to loans on the 9th day of April, 1901.

Mr. Zartman offered the note in evidence.

Received, marked Exhibit 2.

That note was taken up by a note made by Mr. Bacon. I
18 have that note. (Note produced by witness). This note for $4010, is made to represent the amount of the $3000. note and accumulated interest. When the $3000. note was credited to loans, it was charged to the profit and loss account of the bank. When this note was taken up, it was put away in the safe. I think this $4000. note was never entered in the loans of the bank. I could tell by looking. The statement upon the back of that note is in my handwriting. That statement was placed upon that note at the time the note was given.

Q. You may read the statement.

A. "This note is taken for note of the Waterloo Water Company dated October 2, 1894, on which Francis Bacon is a guarantor, and with the understanding that the bank will not demand its payment until Mr. Bacon is prepared to meet it." Signed "H. R. Becker, cashier."

Mr. Zartman offered the note in evidence.

Received and marked Exhibit 3.

Mr. ZARTMAN: The note reads as follows: "Waterloo, N. Y. April 11, 1901. One year after date I promise to pay to the order of the First National Bank of Waterloo, Four Thousand and Ten Dollars ($4010.00) at the First National Bank of Waterloo, N. Y. for value received with interest. Payable in U. S. Gold coin or it equivalent" Signed "Francis Bacon." On the back appears the indorsement just read.

Mr. Zartman read exhibit 2, as follows: Waterloo, N. Y. October 2, 1894. Four months after date we promise to pay to the order of

the Waterloo Water Co. Three Thousand dollars ($3000.00) at the First National Bank of Waterloo, N. Y., for value received. Waterloo Water Co. A. G. Mercer, Treasurer" With the statement on the face "Renewed for four months, April 30, 1895" And the further statement on the face "Charged to P. & L. April 11, 1901."

19 The note endorsed "Waterloo Water Company, A. G. Mercer, treasurer," and with a memorandum "Secured by bonds signed by A. G. Mercer, W. L. Mercer and Francis Bacon."

Since 1901 neither of these notes have been in the loans of the bank which the examiner has examined when he has visited the bank. Other notes of Mr. Bacon have been in the bank that the examiner has handled when he has examined the bank. One note that I recall of $497, I think it was. A note of $200, and one of $800. I cannot tell now when that note of $497, was in the bank. I have that note here — No, I have not. It has been paid, or partially paid. I think the $200, is a partial renewal of that note. I do not recall any other notes of Mr. Bacon that the bank held. The four thousand, the four hundred, the two hundred and an eight hundred dollar note. I have here the two hundred dollar note which I said I thought was the end of the $497, dollar note. (Note produced by witness.)

Mr. ZARTMAN: This note is dated "Waterloo, N. Y., April 25, 1904. Six months after date I promise to pay to the order of the First National Bank Two Hundred Dollars ($200) at the First National Bank of Waterloo, N. Y., for value received with interest Francis Bacon." I offer the note in evidence. No endorsement.

Received and marked Exhibit 4.

The bank holds security for this note; this agreement which has been submitted here and also some bonds of the Waterloo Organ Company. I do not know when this loan was originally made of which this is a part; a number of years ago. I don't know whether we have two or four bonds of the Waterloo Organ Company as security for those. Those bonds are five hundred dollars each. We have another note of Mr. Bacon's of eight hundred dollars. I have

20 that note (Note produced by witness) $816, which is the note heretofore referred to as the eight hundred dollar note. This note has been renewed since the bankruptcy of Mr. Bacon.

Mr. Zartman offered the note in evidence, as follows: "Waterloo, N. Y., November 2, 1904. Four months after date I promise to pay to the order of the First National Bank Eight Hundred Sixteen dollars ($816.00) at the First National Bank of Waterloo, N. Y., for value received. Francis Bacon." No endorsements. Received and marked exhibit 5.

The bank does not hold any other notes against Mr. Bacon. I do not recall that the bank has held any other notes than I have given against Mr. Bacon since the date of this agreement, 1902. I presume very likely the bank examiner asked me what became of that three thousand dollar note. I do not recall any particular conversations about it. He knew that that note was being carried or had been

charged to our profit and loss account. So that since this agreement was made we have had nothing against Mr. Bacon personally except these three notes which I have given you. We have the Organ Company bonds as other security than this agreement of which I have spoken, for the eight hundred dollar note. I do not know when that eight hundred dollar note loan was first made. I could get our books of the loans here inside of ten minutes. That eight hundred dollar loan was not in existence at the time of the making of this contract in 1902. In 1902, beside that four thousand dollar note, the bank held the note of Mr. Bacon's for $497. For that we did not have security of either two or four Organ Company Bonds; we had some stock of the Seneca County Agricultural Society for the $497. note, enough to partially secure it. That stock has since been sold by Mr. Bacon and the proceeds applied upon that note reducing it to a two hundred dollar note.

Q. In this talk with Mr. Graham about your taking collateral, was there any conversation with him as to what kind of collateral
21 he wanted to get.

A. I think Mr. Graham understood; I am certain he did, he knew that we would get an assignment of this collateral which was in the hands of the Exchange National Bank.

He was a National bank examiner. The Exchange National Bank was a bank that he examined as well as our own. I presume he knew that this collateral was there at the Exchange National Bank. I had knowledge as to the value of part of that collateral, the First National Bank stock.

Q. What did you consider to be the value of that?

Mr. Hammond objected.

The Court: If it has a market value, or if he knows the value you may have that.

Q. The value of the stock of the First National Bank?

A. Do you mean the market value of the stock, or its exact value which no one knows but myself?

Mr. Hammond: I make the further objection to anything but the market value.

The Court: I think the market value would be the value of the security at that time.

Witness: The highest sale has been at the rate of sixty per cent. that is the highest of which I have any knowledge. At the time of the making of this agreement we held in the neighbor- of, probably, thirty five or forty thousand dollars of the obligation of the Waterloo Wagon Company. Mr. Bacon was at that time president of the First National Bank, and also president and secretary of the Wagon Company. That indebtedness of the Wagon Company consisted of the straight notes of the Waterloo Wagon Company, first mort-
22 gage bonds of the company, and customer's paper of the company endorsed by the company.

Q. And it was that line of paper that you have said the examiner was chiefly solicitous about?

A. Mr. Bacon was also a guarantor on the Waterloo Organ Company's paper which was in a worse condition than that of the Wagon Company.

Q. And was this agreement made as security also for Mr. Bacon's obligations on the Organ Company paper?

A. It was understood by me to cover his entire obligation to the bank. I thought it covered his obligation on the Organ Company bonds. I think that is about right that the Waterloo Organ Company was adjudicated bankrupt about July, 1902. I think we have, yes, in fact I know we have made a demand of Mr. Bacon on his Organ Company guaranty bond for the payment of the obligations of the Organ Company. Whether we have in any way attempted to enforce against Mr. Bacon any of his obligations on account of the Organ Company bond, might depend on what might constitute an atempt to enforce that obligation. We made a demand on Mr. Bacon. We have not as yet begun any proceedings. We have our reasons. We have never made any attempt to collect from Mr. Bacon this three or four thousand dollar note. We have never asked him to pay up the interest on it and keep the interest paid, that I recall.

Q. Have you ever attempted to obtain for it any other security than this?

A. We considered we had plenty of security.

Q. Have you ever attempted to obtain for it any other security than this?

A. We have not.

Mr. Bacon was the owner of twenty-eight other shares of the stock of this bank.

23 Q. Did you purchase of him that twenty eight shares?

Mr. Hammond objected as immaterial and irrelevant.

Sustained and exception.

—. I do not know whether at the time of the taking of this four thousand dollar — Mr. Bacon was the owner of unincumbered real estate in this village. I never had occasion to look up his real estate. I always supposed his residence in this village was mortgaged. I do not know when that mortgage was made. This action was not begun until five or six months after Mr. Bacon was adjudged a bankrupt.

Q. And not until after you were served with an order to show cause in the bankruptcy court why an order should not be there made that you had no lien upon this property?

A. I had nothing to do with that whatever.

Mr. Hammond: That is true as matter of fact, but I object to the evidence.

I think it was after I was served with an order to show cause from the bankruptcy court, that this action was begun by the service of a summons and complaint. I testified that the occasion of the making of this contract in 1902 was on account of the prodding of the bank examiner.

Q. And at that time there was not in the bank any individual notes of Mr. Bacon, except the $497 note?

A. There was considerable individual obligation of Mr. Bacon perhaps not just in the form of notes. I think this agreement between Mr. Bacon and me was not made in duplicate. I do not recall. I am not sure whether there were two copies of it. I don't know whether Mr. Bacon kept a copy or not. I did not read
24 it over very carefully before it was signed. It was not presented at a meeting of the directors. The directors of our bank did not as a body have anything to do with the making of this contract. I think they never passed upon the contract. I simply mentioned to the Board that I had such a contract. At that time Mr. Bacon was a member of the Board of Directors. I do not know the market value of the Wagon Company stock which we held. We derived those Wagon Company bonds which we held from Mr. Bacon, in payment of some of his obligation to the bank. They are paid. That obligation was another old note upon which Mr. Bacon was either maker or guarantor. I don't think I remember a conversation that I had with you at the time I showed you that agreement last May, in reference to this three thousand dollar note. I do not remember your asking me at that time why I did not collect that three thousand dollar note at the same time I did the ten. I do recall that you did ask me some questions regarding that. That is true. I do not know that I told you at that time any reason for our not collecting this note from Mr. Bacon. There was not any reason beyond our not wanting to, and the agreement was made with Mr. Bacon not to do so. We did not choose to collect it. It was secure.

Q. Did you at that time tell me that you never considered this collateral at Seneca Falls of any particular value, but that now you thought it might be of some value and you wanted to collect that four thousand dollar note?

A. It don't seem to me that I would say anything to you, although I might. If I did, I certainly must have been answering you in such a way to show you that you had no business to ask any such questions concerning it.

I do not believe I did make such a statement to you. I do not recall making any such statement. I don't see any reason why I should. I do not believe I did. I do not recall that conversation that we had particularly.

25 To Mr. HAMMOND:

The First National Bank of Waterloo held these bonds of the Waterloo Wagon Company in February, 1902, when this agreement was made.

Q. Was there anything you wanted to explain concerning the question asked of you by Mr. Zartman in which you stated that you had made demand on Mr. Bacon for the Organ Company bonds?

A. Simply that we had several kinds of security and we preferred to collect in another way, and if we cannot, we may have recourse on Mr. Bacon.

We have chosen some other channel through which to collect it. We did not care at that time to make Mr. Bacon any trouble. Mr. Zartman certainly is trying to prevent us from collecting it through the other channel. The $816. note that I have spoken of in my cross examination is the same debt that was referred to as an eight hundred dollar note in my earlier conversation. It was changed from $800 to $816 by the addition of interest. The $200 note which I have spoken of is a part of the same indebtedness that was represented by the $497 note, and arose from the fact that a part of the larger note was paid and $200 of it renewed by the two hundred dollar note. The $497 note was held by the bank at the time this agreement was made. No, I think the eight hundred dollar note was not also held at that time. The $4010 note which is now held by the bank was the principal of the $3000 Water Company note increased by the addition of interest. The $4000 note was made by Mr. Bacon and is now held by the bank; and I may add that the reason that agreement was made on the back of that note is, that the matter was settled in that way to avoid litigation. Mr. Bacon promised to fight us unless we settled in a way that would be fairly agreeable to him, and we did so rather than have litigation.

26 The obligation was the obligation of the Water Company. Mr. Bacon was liable as guarantor. The Water Company became insolvent. We talked of enforcing our claim against Mr. Bacon. He threatened to defend. And then it was compromised by his giving his note, and we agreeing not to immediately press him for it.

To Mr. ZARTMAN:

I think that four thousand dollar note was given very shortly after the other one was charged up to profit and loss, if I recall.

Q. And was that statement of Mr. Bacon's about his contesting that note made to the directors before they ordered that three thousand dollar note charged off?

A. I do not know that it was ever made to the directors. The conversations were held between myself and Mr. Bacon, regarding the three thousand dollar note, entirely. I think that when discussions were had by the Board of Directors regarding that note Mr. Bacon absented himself from the meetings. I think nothing appears in the minutes of our Board of Directors in reference to that note. The Board never took any action on it except to charge it off. They left it in my hands for settlement entirely as I saw fit. Mr. Bacon kept an open account with our bank. And also an account sometimes in Certificates of Deposit; and at times considerable amounts appeared either in certificates of deposit or in the open account.

Q. And from these amounts it would have been possible for him to have paid you this three thousand dollar note?

Mr. Hammond objected. Sustained. Exception.

FRANCIS BACON, being duly sworn, testified as follows:

27 To Mr. HAMMOND:

I live in Waterloo. In 1902, I was president of the First National Bank of Waterloo; and at the same time I was president and secretary of the Waterloo Wagon Company. My time was given to the Wagon Company. I had been president of the First National Bank since 1897, I think. I had been president of the Waterloo Wagon Company since 1893. On February 15, 1902, I was the owner of 131 shares of the capital stock of the Waterloo Wagon Company, Limited, subject to their pledge to the Exchange National Bank of Seneca Falls. And, subject to the same pledge, I was the owner of 253 shares of the stock of the First National Bank of Waterloo, on the same day. All of these shares had been pledged by me to the Exchange National Bank of Seneca Falls. The pledge was then alive and in force on February 15, 1902. Prior to that day I had had various conversations with Mr. Becker concerning my turning over these shares of stock subject to the claim of the Exchange National Bank of Seneca Falls to the First National Bank of Waterloo. The first conversation was with Mr. Becker's uncle. The bank was reorganized in 1898. Mr. Norman H. Becker, the uncle of Mr. Becker was the vice president of the bank and I was an obligor on the Water Company bond, the Wagon Company bond and the Organ Company bond, and the first conversation was held with Mr. Norman H. Becker. He died very suddenly, and that was continued by his nephew and myself until it was consummated upon the date of the instrument. Mr. Graham, the bank examiner, came here and he felt that the obligations that I was under were large and there was a good deal said pro and con, and he thought something should be done in the way of security, some security to make good my name upon those obligations. He and I talked upon that subject. I was perfectly willing, as an officer of the bank, to give the security, all that I had to give at the time. Then I had a talk with Mr. Becker. We had several talks. I cannot

28 give you the words. I can give you the substance. He, as a bank officer, wanted additional security, and I was willing to give it, and we came to an understanding. I agreed to give him the securities which were held by the Exchange National Bank upon the same conditions which I gave them to them. Those conditions were, they were to cover the obligations of the Waterloo Wagon Company and also my own individual obligations to the First National Bank of every kind and nature, as I had given them to the Exchange National Bank, formerly so, individually. Mr. Becker said they would accept them. I cannot give you the words that were said between us on that subject covering that agreement, but the meaning, the substance of it was. I agreed to give it and I executed, or had executed up at the Wagon shop by my stenographer, the agreement which you have there, and I took it down to the bank and offered to Mr. Becker, and Mr. Becker accepted it. I then believed and intended that this written agreement that I took down to the bank and handed to Mr. Becker covered my individual

obligations to the bank. I fully believed it. I continued in that belief until Mr. Becker in the latter part of May or first of June, 1904, when I went into the bank one day told me that he discovered there was an error in that, and I did not believe it then until he showed it to me. I would like to state that in our conversations; Mr. Becker and myself, that he was to deliver up the bond of the Waterloo Wagon Company to me, release that, provided I gave him this security which was to cover the same thing. And he did that. During the conversations that led up to or resulted in this writing, this four thousand dollar note was mentioned at some time. That was referred to as one of the things that the bank wanted more security for. I was not at that time in a condition to pay it, and that was part of the consideration, that I was to have time to pay that note, and that they would not press me. The consideration of that note was a debt of somebody else that I had made myself
29 liable for, a debt of the Waterloo Water Company. I had this paper, which is exhibit 1, this written agreement prepared. It was prepared by the stenographer up at the Wagon Company. I dictated it. My stenographer wrote it out; and he left out a few words that I did not notice. I intended to include my own personal liability in that paper as well as the liability of the Wagon Company. I supposed it was included in that paper when I signed it, and stated to the Board of Directors of the bank that it included my own. I stated that to them in open meeting. And when I made that statement, I believed it. At the time that paper was executed, I was individually obligated upon the three thousand dollar note, and also upon a note for $497. The three thousand dollar note had then been merged into the four thousand dollar note. The $1010 that was the three thousand dollar Water Company note that was merged into this. I gave that individual note to take up that obligation. The individual note I refer to is exhibit 3. The bank held that at that time, and it also held the $497 note. And that note was afterwards partially paid; and $200 of it renewed. After that I gave to the bank a note for $800. And the bank still holds that. And the $1000 the $800 note and the $200 note, a fraction of the $497 note, are all unpaid. The $800 note is the $846 note that you now have in your hand. It was intended that this assignment should cover every individual liability of whatever kind or nature, whether as obligor or money borrowed or in whatever form it might come. There was no limitation as to time in my agreement which I made with Mr. Becker. It was a continuing liability. It was to be a continuing liability. There was no limitation as to what paper it referred to, whether past, or present or future. It was to cover everything that existed and what would exist. The understanding as to when these shares of stock should be transferred or delivered from the Exchange National Bank of Seneca Falls to the First National Bank of Waterloo was, they were to be delivered as soon as they ceased to be held by the
30 Exchange National bank, or, in other words, whenever any of my liabilities were wiped out there, if anything remained it was to go to the First National bank. They were to be trans-

ferred from the Exchange National Bank to the First National Bank of Waterloo as fast as they were relieved from the pledge at the Exchange National bank, and written notice was sent to the Exchange National Bank to that effect after this obligation was made.

To Mr. ZARTMAN:

I couldn't tell you the time when my first conversation was with Herbert Becker about this assignment of stock. It was along in 1900. It was after his uncle's death. It might have been before, too. He might have taken part in the conversation then.

Q. What was your agreement at that time with him?

A. With who?

Q. With Mr. Herbert Becker of the First National Bank?

A. What agreement are you referring to?

Q. What agreement did you make, that you have testified you have made, that you would assign stock.

A. That agreement lies on the table there.

Q. That was the agreement that you made with him at that time?

A. As it would be if reformed, that it was to cover all of my own indebtedness.

Q. Will you please give me the exact language of your agreement with Mr. Becker the first time you agreed to give him any assignment of this stock?

A. I do not know as we got to any agreement in the first conversation. The agreement was never consummated until that paper was given. That was the date of the agreement. The conversations before had been preliminary to that agreement.

31 Q. Did you ever make an agreement with him before the making of this written agreement; the written agreement is the agreement?

A. That is all the agreement we ever made. We did not make half a dozen; we made one.

Q. There wasn't any conclusion then or any agreement between you and Mr. Becker as to what should be included in that agreement except what would be expressed in that agreement?

A. We talked of what should be included, and when the paper was signed that was the agreement, the conclusion of it.

We talked that there should be included in there everything that I have stated. All of my own liabilities and the liabilities of the Waterloo Wagon Company. Yes there was something else, the Organ Company too. Yes, we talked that all over. It was to cover everything. I certainly did consider, at the time of the making of that agreement, that the Organ Company obligations were under this assignment. I really do not remember my testimony upon the trial of this action a few weeks ago.

Q. Did you at that time in answer to this question testify as follows: "Q. You don't claim that this assignment of the collateral, of these stocks, to the First National bank is for your obligations on the Organ Company bonds, do you? A. I don't, no"?

A. If I did I will amend it now.

Q. Did you so testify then?

A. I don't know whether I did or not now. I don't remember whether I did or not.

Q. Was this question asked you "Q. So far as the Organ Company's bonds were concerned, your assignment of this collateral didn't indicate any of your obligations there? A. No, sir."

A. I don't remember.

32 Q. Did you so testify?

A. I don't remember that. That would probably tell what I did. I don't remember anything about it now.

Q. I ask the question whether you at that time answered "No Sir" to the question that "So far as the Organ Company's bonds were concerned, your assignment of this collateral did not indicate any of your obligations there?

A. If I did, I did not understand the question clearly. I was under a misapprehension. I want to amend it if I did answer in that way.

Q. In answer to this question: "You don't recognize that you had any obligations upon those Organ Company bonds? and your answer was "In that assignment; No, Sir"?

A. I was a signer on the Organ Company bonds, why wouldn't I have an obligation?

I was examined in supplementary proceedings before the bankruptcy.

Q. And did you testify before Mr. Bodine upon that examination that the only obligations that the First National Bank held against you that were secured by this stock were the Wagon Company notes and your $200 note and $800 note.

A. Perhaps I did. If I did it wasn't—I did owe more.

Q. Then the testimony that you gave before Bodine was not true.

A. No I did not mean to deceive. It was simply a case of forgetfulness if I so testified.

I think this agreement with the First National Bank was made in duplicate. I haven't any duplicate now; I think I did have one. I think that duplicate of this contract was in my safe down in my house until recently.

Q. So that in all these years since this contract was made you have had a copy of it as well as Mr. Becker?

A. I never looked at it.

33 I don't know what has become of it. I was subpœnaed to produce that here. I haven't it: I could not find it. I destroyed most all the papers I had there and I suppose that was among them. Mr. Becker and myself were present when this agreement was executed and I suppose it was subscribed or sworn to before Dennison, a clerk there. I don't know who did take the acknowledgement.

Mr. HAMMOND: It is not acknowledged.

Q. Did you and Mr. Becker read it over before you executed it?

A. I suppose it was read over. I don't know, not very carefully. I brought it down and gave it to him and told him there was a contract, and he said all right, and we signed them.

I stated on my direct examination that when I had my first talk

with Mr. Becker about the giving of collateral, I agreed to give him what security I could. I made that statement to him some time along when we first began to talk about it. I can't tell exactly when. At the time I gave this security or at the time I made that agreement to give him such security, I did not have real estate that was not encumbered. Really, I don't remember when I did encumber my real estate. It may have been in 1900. I think it was. I don't recollect whether it was on the 31st day of July, 1901, that I made the mortgage upon my realy estate. It may have been. And all the time down to January, 1904, I owned these twenty eight shares of bank stock; and there was no claim against them. And I also had an account with the First National bank. In that account there was very seldom a very large balance to my credit. I used it up generally about as fast as it went in. Very rarely I had balances of a thousand dollars or two thousand dollars more than my account. There were times, might have been before that.

—. You also had certificates of deposit during this time in
34 the bank of four or five thousand dollars in your name?

A. Belonging to other parties. I have no recollection of having any certificates of deposit of four or five thousand dollars

Q. Will you say that you did not have a certificate of deposit in February, 1902, of more than five thousand dollars, out of which you bought stock and paid for it to the amount of more than four thousand dollars and later sold that stock for more than five thousand dollars?

A. It belonged to other parties. I did not have such a certificate in this bank. I think this agreement was made by my stenographer at my dictation. No one else except my stenographer and myself had anything to do with putting this agreement into writing. I dictated it and she printed it. I couldn't tell you whether, after my stenographer wrote that out, I read it over before I took it down to Mr. Becker, or not. It is long ago. I do not call to mind whether Mr. Becker and I read it over after I took it down there to him and before we signed it. I handed it to him and told him there it was, and I would sign it if he would, and that was all there was of it. I was frequently in the bank when Mr. Graham or Van Vranken were there; not when they were examining this agreement. I think the examiners have spoken to me about this agreement, but I cannot remember positively in regard to it. I don't call to mind anything particularly now ever being said to me about it, if they did speak to me about it.

To Mr. Hammond:

I answered to Mr. Zartman that the written agreement contains all that we ever agreed to, the consummation of the agreement between Mr. Becker and myself. I mean including my own liabilities, including the addition of my own liability to this written contract. In that answer I intend all the time to be understood that our agreement covered my own individual liabilities as well
35 as the liabilities of the companies upon which I was obligor. And when I referred to the agreement I meant the agree-

ment as we actually made it, as I have stated, as we talked. That is what I meant.

To Mr. ZARTMAN:

Q. Do you say that in February or March of 1901 you did not have a certificate of deposit in the First National Bank of about five thousand dollars and out of the certificate buy stock, and afterwards sell the stock, about the first of April and take another certificate for more than five thousand dollars in your own name?

A. I haven't any recollection of it.

Q. Will you say you did not?

A. I haven't any recollection. That is all I will say.

Q. And did you not, later, in that same year, have other certificates of deposit in the First National Bank?

A. I don't call to mind any, although I presume I had, for I was doing business with the bank all the time, but I don't call to mind any of them.

Plaintiff rested.

Mr. Zartman renewed his motion made at the beginning of the case to dismiss the complaint upon the complaint itself upon the same grounds there stated.

Motion denied, with leave to renew it when the whole case is in.

Mr. Zartman moved for a nonsuit upon the grounds:

First. That the complaint does not allege that there was any consideration for the making of the agreement which is sought to be reformed, and the proofs do not show any such consideration.

36 Second. That the complaint does not allege that the mistake complained of is material, that the plaintiff will be prejudiced by allowing the agreement to stand, or that the plaintiff will be benefitted by the reformation asked, and the proofs do not show it.

Third. That the complaint does not allege that the plaintiff has any equities superior to this defendant, and there is no proof of such superior equity.

Fourth. That the complaint does not allege that any demand has been made upon any defendant for the relief asked for in the complaint, and there is no proof of any such demand upon either defendant.

Fifth. That the facts stated in the complaint are not sufficient to constitute a cause of action, and that the proofs offered by the plaintiff are not sufficient to establish or maintain a cause of action.

Sixth. That the adjudication of the defendant Bacon as a bankrupt prior to the commencement of this action constitutes a complete bar to the recovery of any judgment herein.

Seventh. That if any judgment were recovered in this action, it could not become in any way a lien upon the stock described in the complaint, or in any way increase or change the lien upon said stock which plaintiff had at the time of said adjudication in bankruptcy.

Denied and Exception.

Mr. Zartman offered in evidence the judgment roll in an action

entitled Leonard Story *vs.* Francis Bacon and others, which shows a judgment entered in the Seneca County Clerk's Office on the 21st day of April, 1904, at four and one half o'clock p. m., for the sum of $5576.97. And an execution issued upon said judgment on the 21st
37 day of April, 1904, to the Sheriff of the County of Seneca, and returned by him *nulla bona* on the 15th day of June, 1904.

Also offered in evidence a judgment roll in an action entitled Leonard Story *vs.* Francis Bacon and others, being the second action, with the same title, showing a judgment entered in Seneca County Clerk's Office on the 21st day of April, 1904, at four and one half o'clock p. m., for the sum of $4150.32. And an execution issued upon that judgment, the same day, to the sheriff of Seneca County and returned by him *nulla bona* on the 21st day of April, 1904.

Also offered in evidence judgment by Leonard Story *vs.* Francis Bacon entered in the Seneca County Clerk's Office on the 28th day of April, 1904, at three o'clock p. m. for the sum of $9225.18. Upon that judgment no execution was issued to the Sheriff of Seneca County.

Each judgment received.

Mr. Zartman also offered in evidence an order made by the County Judge of Seneca County on the 4th day of May, 1904, appointing George F. Bodine receiver in proceedings supplementary to execution upon the second judgment above described. Entered May 4, 1904 in the Seneca County Clerk's Office.

Received.

Also offered in evidence the bond of George F. Bodine as receiver under the above order. Approved by the County Judge of Seneca County and filed on the 4th day of May, 1904.

Received.

Evidence closed.

38 Mr. Zartman renewed his motion to dismiss upon the same grounds already stated, and also for the further reason that the proofs now show that, prior to the adjudication of Bacon as bankrupt, a receiver in proceedings supplementary to execution had been appointed of his property, and that by the adjudication the rights of that receiver vested in the trustee, and that the equities and rights of that receiver and of this trustee in this property are now superior to that of this plaintiff.

Decision reserved.

Supreme Court, Seneca County.

FIRST NATIONAL BANK OF WATERLOO
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon.

The above entitled action having been tried before the Court without a Jury, at an adjourned Special Term held by Hon. James A.

Robinson, at Waterloo, N. Y., on the 20th day of Feb., 1905, and after hearing all the evidence and proofs and arguments of counsel and having fully considered the same, the following findings of fact and of Law are made and decided as follows:

I.

That the plaintiff is a domestic corporation engaged in the business of banking at Waterloo, N. Y.; and that the defendant Francis Bacon was adjudicated a voluntary bankrupt on the 4th day of May 1904, and that the defendant George E. Zartman has been appointed, and is acting as trustee in Bankruptcy of the said Francis Bacon.

39 II.

That on or about the 14th day of February 1902, the defendant Francis Bacon was a stockholder and director in and president of the plaintiff, (and that he was also then indebted to the said plaintiff in several sums of money which were represented by several promissory notes signed by him and held by the plaintiff), that on or about the said 15th day of February 1902, said Bacon was the owner of 461 shares of the capital stock of the Waterloo Wagon Company Limited, which was represented by eight different certificates which are set forth and described in the complaint, and he was at the same time the owner of 253 shares of the capital stock of the First National Bank of Waterloo, which was represented by six several certificates of said stock, as described in the complaint.

That the said shares of stock of the said Wagon Company owned by the said Bacon as aforesaid, had been transferred by him to the Exchange National Bank of Seneca Falls, as collateral security for liabilities of the said Francis Bacon and of the Waterloo Wagon Company and said shares of stock were at that time held at the Exchange National Bank of Seneca Falls for and as such collateral security.

III.

That on or about the 15th day of February 1902, it was agreed between the said Francis Bacon and the said First National Bank of Waterloo, that (in consideration of the loans that had been made by the said bank to said Bacon and in consideration of the indebtedness he was then owing the said bank, and of the indebtedness which he should thereafter owe to the said Bank), he, the said Bacon, would sell and transfer to the said First National Bank of Waterloo the said 461 shares of the capital stock of the Waterloo Wagon
40 Company and the 253 shares of the capital stock of the First National Bank of Waterloo, N. Y., to be held by said First National Bank of Waterloo as a continuing collateral security for the payment to it of any indebtedness or liability of any kind absolute or contingent, then existing, or that might thereafter exist, arise, accrue or be contracted on the part of the said Waterloo Wagon Company Limited, or him, the said Francis Bacon, to the said Bank, subject only to the prior right thereto of the Exchange National Bank of Seneca Falls, N. Y., and that the said shares of stock upon

their surrender by the Exchange National Bank of Seneca Falls, N. Y., should be deposited with the said First National Bank of Waterloo, N. Y., that it was also agreed by and between the said Bacon and the said First National Bank, that the said agreement should be written out and should be subscribed (and duly delivered by each party to the other.)

IV.

That pursuant to said agreement between the parties, the said Francis Bacon undertook to dictate and did dictate to his stenographer, the said agreement so made between the parties, intending to dictate and have written out by her, the agreement so made between the parties as aforesaid; that in the dictating or in the writing out of the said agreement, certain words or parts of such agreement were by mistake and without intention omitted therefrom, so that the said agreement as then written did not express the true agreement and understanding of the parties; that the plaintiff and the defendant Francis Bacon supposing that the said agreement did express the true agreement and understanding between the parties, signed the same (and delivered each to the other a duplicate thereof); that in fact the said agreement so signed by the said parties, by the mutual mistake of both parties thereto, did not contain the full agreement so made by them, but omitted certain material parts thereof
41 which both parties intended to incorporate in the said agreement and which were omitted therefrom by their mutual mistake.

V.

That the contract that was actually executed by the said parties, appears as schedule No. 1, attached to the complaint, and that the contract that was actually made between the parties and as it should have been written out and executed, appears as schedule No. 2, attached to the said complaint.

VI.

That neither of the parties to the said agreement knew the fact of such mistake until after the adjudication of the said Bacon as a bankrupt, when the fact of such omission was discovered by the claim set up by the defendant Zartman, as trustee in Bankruptcy, that the First National Bank of Waterloo did not have any claim upon the said shares of Wagon Company stock and shares of Bank stock as security for any liability of the said Bacon to the said Bank.

VII.

That the plaintiff could not have or obtain any adequate remedy in an action at Law for the relief asked for in this action.

VIII.

And as conclusions of law:

I.

That the plaintiff is entitled to the relief asked for in the complaint.

42 II.

That the said written instrument, a copy of which is annexed to the complaint herein and marked Schedule No. 1, be reformed and corrected so as to express the true agreement and understanding and intention of the parties thereto, as heretofore are stated; so that the said shares of stock of the said Wagon Company and of the said First National Bank, shall be held and owned by the said First National Bank of Waterloo, as collateral security for any indebtedness which existed February 15th, 1902, or which thereafter accrued or was owing from the said Bacon to the said First National Bank, as well as for any indebtedness of the said Wagon Company to the said Bank, and that the said shares of stock should be surrendered by the said Exchange National Bank of Seneca Falls, to the said First National Bank of Waterloo subject to the prior right of the said Exchange National Bank of Seneca Falls to hold the same as collateral security for any indebtedness owing to it by the said Bacon or the said Waterloo Wagon Company.

III.

That the said agreement so actually signed and delivered by the said parties dated Feb. 15, 1902, and which is set forth as Schedule No. 1 annexed to the complaint, be so corrected and reformed as to read as set forth in Schedule No. 2 annexed to the said complaint.

IV.

That the plaintiff may enter judgment according to these findings and decision.

JAMES A. ROBSON,
Justice of Supreme Court.

43 At a Special Term of the Supreme Court held at the Court House in the Village of Waterloo, N. Y., in and for the County of Seneca, on the 20th day of Feb. 1905, for the Trial of Equity Actions.

Present: Hon. James A. Robson, Justice.

Supreme Court, Seneca County.

FIRST NATIONAL BANK OF WATERLOO
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon.

The above entitled action having been tried before this court without a jury at the above term and having been decided by the Court in favor of the plaintiff and against the defendants; and Findings of fact and conclusions of Law having been made and filed herein; and judgment having been ordered in favor of the plaintiff and against the defendants, for the relief asked for in the complaint and as set forth in said Findings.

Now therefore, on motion of Hammond & Hammond attorneys for the plaintiff, it is hereby adjudged that the written instrument, a copy of which is annexed to the complaint herein and marked Schedule No. 1, be reformed and corrected so as to express the true agreement, understanding and intention of the parties thereto at the time the same was executed, towit,—so that the said shares of capital stock of the said Waterloo Wagon Company and the shares of capital stock of the First National Bank of Waterloo mentioned in the said instrument, shall be held and owned by the said First National Bank of Waterloo as collateral security for any in-
14 debtedness which existed prior to and on Feb. 15, 1902, or which thereafter accrued or was owing from the said Francis Bacon to the said First National Bank as well as for any indebtedness of the said Wagon Company to the said Bank; and that the said shares of stock should be surrendered by the said Exchange National Bank of Seneca Falls to the said First National Bank of Waterloo subject to the prior right of the said Exchange National Bank of Seneca Falls, to hold the same as collateral security for any indebtedness owing to it by the said Bacon or the said Waterloo Wagon Company.

And it is further ordered and adjudged, that the said instrument and agreement executed between the said First National Bank of Waterloo and the said Francis Bacon bearing the date the 15th day of Feb. 1902, a copy of which is attached to the complaint in this action and marked schedule No. 1, be so reformed and corrected that the same shall read as follows:

FEB. 15, 1902.

This is to certify that Mr. Francis Bacon, of Waterloo, N. Y., has deposited with the Exchange National Bank of Seneca Falls, N. Y., the following property viz.

161 shares of the capital stock of the Waterloo Wagon Co. Limited, represented by the following certificates, viz:

No.	49	for 110 shares;	No.	75	for 106¼ shares
"	50	for 5 "	"	102	for 5 "
"	54	for 57½ "	"	104	for 111¼ "
"	50	for 50 "	"	130	for 16 "

253 shares of the stock of the First National Bank of Waterloo, N. Y., represented by the following certificates viz.—

45	No.	188	for 50 shares	No.	191	for 50 shares
	"	189	for 15 "	"	192	for 28 "
	"	190	for 25 "	"	201	for 85 "

To be held by said bank as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, due or not due, now existing or that may hereafter exist, arise, accrue or be contracted, on the part of himself or of the Waterloo Wagon Company Limited, to said Bank, and the said Francis Bacon hereby agrees with the First National Bank of Water-

loo, that the said certificates of stock above named are transferred to and may be held by the said First National Bank of Waterloo as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, now existing or that may hereafter exist, arise, accrue, or be contracted on the part of the Waterloo Wagon Co. Limited or himself to said Bank; and said shares of stock upon their surrender by the Exchange National Bank shall be deposited with the said First National Bank of Waterloo.

FIRST NATIONAL BANK OF WATERLOO.
By H. R. BECKER, *Cas.*
FRANCIS BACON.

And it is further adjudged that the said agreement and instrument so reformed and corrected is and shall be the real and true agreement made and executed by and between the said Francis Bacon and the First National Bank of Waterloo, N. Y., on the 15th day of Feb. 1902, and shall be binding upon the said parties and their respective assigns and all persons holding by, through or under them and especially upon the defendant George E. Zartman as trustee in bankruptcy of the said Francis Bacon.

HERBERT J. FEEHAN, *Clerk.*

46 Supreme Court, Seneca County.

FIRST NATIONAL BANK OF WATERLOO
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon.

The defendant, George E. Zartman as trustee in bankruptcy of Francis Bacon hereby gives notice that he excepts to the rulings of the court, upon questions of law, in the above entitled action, contained in its written decision, upon which judgment was entered in said action in Seneca County Clerk's Office, October 30, 1905, as follows:

First. This defendant excepts to the first conclusion of law and to each and every part thereof.

Second. This defendant excepts to the second conclusion of law and to each and every part thereof.

Third. This defendant excepts to the third conclusion of law and to each and every part thereof.

Fourth. This defendant excepts to the fourth conclusion of law and to each and every part thereof.

Dated, November 8th, 1905.

FREDERICK L. MANNING,
Attorney for Defendant, George E. Zartman, as Trustee, Waterloo, Seneca Co., N. Y.

47 Supreme Court, Seneca County.

THE FIRST NATIONAL BANK OF WATERLOO
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon.

Take notice that the defendant, George E. Zartman as trustee in bankruptcy of Francis Bacon, appeals, upon questions of law and upon the facts, to the Appellate Division, Fourth Department, of the Supreme Court, from the final judgment entered in this action on the 30th day of October, 1905, in the office of the Clerk of the County of Seneca, N. Y., and from each and every part of said judgment.

Dated, November 28, 1905.

FREDERICK L. MANNING,
Attorney for Defendant, George E. Zartman, as Trustee, etc., Waterloo, N. Y.

To Hammond & Hammond, Esqs., Attorneys for Plaintiff, and to Herbert J. Feehan, Esq., Clerk of the County of Seneca.

Affidavit of No Opinion.

STATE OF NEW YORK,
County of Seneca, ss:

George E. Zartman, being duly sworn, says he is one of the defendants in this action; that, as deponent is informed and
48 believes, the trial court did not make any written opinion, upon the decision of this case.

GEORGE E. ZARTMAN.

Sworn to before me this 12th day of Dec. 1905.

FRED. G. STEWART,
Notary Public.

Stipulation as to Case.

It is hereby stipulated and agreed between the parties to this action and their respective attorneys, that the foregoing are full and true copies of transcripts from the notice of appeal, the judgment roll, the judgment appealed from and of all papers upon which it was made and entered, and of the evidence given and proceedings had on the trial of this action, and of the case and exceptions in this action; and that this stipulation shall take the place of the certificate of the clerk as to the correctness of the same, and that the printed copy may be filed as the original settled case; and that this stipulation shall be taken as a full compliance with general rule No. 41.

HAMMOND & HAMMOND,
Attorneys for Plaintiff, Seneca Falls, N. Y.
FREDERICK L. MANNING,
Attorney for Defendant, Waterloo, N. Y.

49 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial department, at the City of Rochester, commencing on the 1st day of May, 1906.

Present Honorable Peter B. McLennan, Presiding Justice.
Present: Honorable Alfred Spring,
" Honorable Pardon C. Williams,
" Honorable Edwin A. Nash,
" Honorable Frederick W. Kruse,
Associate Justices.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y.,
vs.
FRANCIS BACON, as, etc., ET AL.

The above named George E. Zartman, as trustee in Bankruptcy of Francis Bacon, one of the defendants, in this action having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court entered in the office of the clerk of the County of Seneca on the thirtieth day of October, 1905, and the said appeal having been argued by Mr. George E. Zartman of counsel for the appellant, and by Mr. J. N. Hammond, of counsel for the respondent, and due deliberation having been had thereon.

It is hereby ordered that the judgment so appealed from be, and hereby is, affirmed, with costs.

Opinion by Williams, J. All concur.

NEWELL C. FULTON, *Clerk*.

Entered 2 day of May, 1906.

Supreme Court, Appellate Division, Fourth Judicial Department.

CLERK'S OFFICE, ROCHESTER, N. Y.

I, Newell C. Fulton, clerk of the Appellate Division of the
50 Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a copy of the order made by said court upon the appeal in the within entitled action or proceeding, and entered in my office on the Second day of May, 1906, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, this third day of May, 1906.

[Seal Supreme Court, Appellate Div., Fourth Dept.]

NEWELL C. FULTON, *Clerk*.

Supreme Court, Seneca County.

FIRST NATIONAL BANK OF WATERLOO, N. Y.,
vs.
GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon, *et al.*

A judgment having been rendered in the above entitled action in favor of the plaintiff and against the defendants decreeing the reformation of the contract in writing set out in the complaint, which judgment was entered in the Seneca County Clerk's office on the 30th day of October, 1905; and the above named defendant, George E. Zartman as trustee in bankruptcy of Francis Bacon, having appealed from said judgment to the Appellate Division of the Supreme Court in the Fourth Department; and the said appeal having been argued in the said Court and having been decided at a term thereof held May 1st, 1906, and the said court having ordered that the judgment so appealed from be affirmed with costs; and the re-
51 mittitur from the said appellate Division having been filed in the Seneca County Clerk's office on this day.

Now therefore, on motion of Hammond & Hammond attorneys for the plaintiff, it is hereby ordered and adjudged that the said judgment above described and appealed from as above stated, be and the same hereby is in all things affirmed.

And it is further ordered and adjudged that the plaintiff recover of the defendant his costs on such appeal which have been taxed and which amount to the sum of $82 05.

HERBERT J. FEEHAN, *Clerk.*

THE FIRST NATIONAL BANK OF WATERLOO, N. Y., Respondent,
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon, Appellant.

Appellate Division, Fourth Department, March Term, 1906.

McLennan, Presiding Justice; Spring, Williams, Nash & Kruse, Associate Justices.

Appeal from a Judgment of the Supreme Court, Entered in Seneca County, October 30, 1905.

Frederick L. Manning and George E. Zartman, for Appellant.
Hammond & Hammond, for Respondent.

WILLIAMS, *J.*:

52 The judgment should be affirmed with costs.

The action was to procure the reformation of a written contract made by the plaintiff and the defendant Bacon, February 15, 1902.

Before the contract was made Bacon was President of the plaintiff, and also of the Waterloo Wagon Co. He was active in the office of the Wagon Co. The business of the plaintiff was looked after by the Cashier Becker. The plaintiff had extended credit to the Wagon Co. and to Bacon individually, discounting paper and taking notes. The Exchange National Bank of Seneca Falls held, by assignment from Bacon, 461 shares stock of the Wagon Co. and 253 shares stock of the plaintiff Bank, as continuing collateral security for any existing or future indebtedness of Bacon or the Wagon Co. The contract between Bacon and the plaintiff as executed did not contain the words "are transferred to" before the words "may be held by" &c., relating to these shares of stock, nor the words "now existing or" before the words "that may hereafter exist," relating to the indebtedness to the plaintiff. The Court, by its decision, reformed the contract by inserting these words. The evidence was undisputed that these were mutual mistakes made in preparing and executing the contract. In the meantime, however, Bacon had become a bankrupt, having been so adjudicated May 4, 1904, and defendant Zartman had been appointed trustee. This action was begun October 17, 1904. The trustee alone defends and appeals. Several objections are made to the decision of the Court, which we consider.

1. It is said that there was no valid pledge of the stock to the plaintiff because possession of the scrip was in the Seneca Falls Bank. Delivery of possession of property is ordinarily essential to the making of a pledge, but in the case of stock there can be no delivery thereof. The scrip is not the stock itself, and as to property
53 not capable of manual delivery, a pledge may be created by a written transfer thereof.

Wilson *vs.* Little, 2 N. Y., 443.

By the contract here as reformed, there was such written transfer, and not merely an agreement to make such transfer in the future. Even if delivery of the scrip to the Seneca Falls Bank, and the possession thereof by it, could be regarded as possession in that bank of the stock, still when the stock was subsequently pledged to the plaintiff, subject to the lien of the Seneca Falls Bank, the possession by the first pledgee might be regarded as the possession of the second pledgee through the agency of the former.

Jones on Pledges and Collat., Sec. 2 ed., pp. 81 & 2, Sec. 83

2. It is said that no consideration for the contract was alleged in the complaint, and it was improper to permit any consideration to be proven on the trial. The contract itself showed a pledge for present and future indebtedness, and it might fairly be assumed therefor that there was some indebtedness then existing. We do not see that any reversible error was committed in aiding such assumption by some evidence of such indebtedness. This action, it will be remembered, was merely to reform the contract, not to establish any indebtedness thereunder. That will be determined in another action if there is controversy with reference thereto.

3. It is said the Court was powerless to afford the relief sought. While very likely Bacon could not, after he was adjudged a bank-

rupt, have corrected the contract, because the rights of creditors had intervened, and they were represented by the trustee, who alone had power to act, for the debtor as well as the creditors yet when both Bacon and the trustee were brought into court, we see no reason why the relief asked for could not be afforded.

4. It is said no demand was made before suit. No demand
54 was necessary. Bacon could not comply with the demand and the trustee would not have been justified in doing so. The demand could have served no useful purpose. No costs were allowed plaintiff by the trial court.

5. It is said that the bankruptcy of Bacon constituted a bar to the relief granted in this action. This cannot be true. The trustee took the bankrupt's property in the same condition and subject to the same liens as the bankrupt himself held it. The trustee is in no sense a *bona fide* purchaser for value, and entitled to protection as such. No new lien was created by the decision and judgment appealed from. The original lien was adjudicated and determined.

We conclude that the judgment is right and should be affirmed.

All concur.

Decided May 2, 1906.

Supreme Court, Seneca County.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y., Respondent,

vs.

FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon, Appellant.

Take notice, that the defendant, George E. Zartman, as trustee in bankruptcy of Francis Bacon, appeals to the Court of Appeals from the judgment of the Supreme Court, in this action, entered in the Seneca County Clerk's Office on the 22nd day of May, 1906, pursuant to Order of the Appellate Division, Fourth Department, of the Supreme Court, entered on the 2nd day of May, 1905, affirming a final judgment entered in this action in said Seneca County Clerk's Office on the 30th day of October, 1905, in favor of the plaintiff and
55 & 56 against the defendants.

And that the appellant intends to bring up for review upon said Appeal the said Order of said Appellate Division above referred to, upon which said judgment of affirmance was entered.

Dated, Aug. 16, 1906.

FREDERICK I. MANNING,

Attorney for Appellant, Waterloo, Seneca Co., N. Y.

To Hammond & Hammond, Esqs., Attorneys for Respondent, and to Herbert J. Feehan, Esq., Clerk of Seneca County.

Stipulation.

It is hereby agreed and stipulated between the parties to this action and their respective attorneys, that the foregoing are full and

true copies of transcripts from the judgment roll, the case and notice of exceptions, the order and judgment given thereon, the opinion of the Court, and the notice of appeal, and formal certification of the same by the clerk is hereby waived.

HAMMOND & HAMMOND.
Attorneys for Respondent, Seneca Falls, N. Y.
FREDERICK L. MANNING,
Attorney for Appellant, Waterloo, N. Y.

57 COURT OF APPEALS.
State of New York, ss:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 1st Day of October, in the year of our Lord one thousand nine hundred and seven, before the Judges of said Court.

Witness the Honorable Edgar M. Cullen, Chief Judge, presiding.
W. H. SHANKLAND, *Clerk.*

Remittitur, October 2nd, 1907.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y., Respondent,
agst.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee, &c., Appellant.

Be it remembered that on the 3rd day of October in the year of our Lord one thousand nine hundred and six, George E. Zartman, as trustee &c., the appellant in this action, came here into the Court of Appeals, by Frederick L. Manning, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And the First National Bank of Waterloo, N. Y., the respondent in said action, afterwards ap-
58 peared in said Court of Appeals by Hammond & Hammond, its attorneys. Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. George E. Zartman of counsel for the appellant, and by Mr. J. N. Hammond of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant cost of appeal to this Court.

And it was further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things Affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the Statute in such case made and provided to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof &c.

59 W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *October 2nd*, 1907.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND, *Clerk.*

(Endorsed:) Seneca County Clerk's Office. Filed Nov. 13, 1907. H. J. Feehan, Clerk.

60 At a Special Term of the Supreme Court, Held at the Courthouse, in the City of Rochester, N. Y., on the 9th Day of November, 1907.

Present: Hon. George A. Benton, Justice, presiding.

Supreme Court, Seneca County.

FIRST NATIONAL BANK OF WATERLOO, N. Y.,

vs.

FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee of Francis Bacon.

On reading and filing the remittitur in this case from the Court of Appeals, in which it is set forth that the said judgment was by the decision of the said Court of Appeals made on the 12th day of October, 1907, in all things approved with costs and that the same should stand in full force, strength and effect.

Now therefore, on motion of Hammond & Hammond, attorneys for the plaintiff and respondent in said action, it is hereby

Ordered, that the said remittitur and the record and proceedings in this action in the said Court of Appeals be, and the same hereby are received into this our Supreme Court to be proceeded with as therein provided by law.

And it is further ordered, that judgment be entered in
61 this Court in favor of the plaintiff and against the defendant upon the affirmance by the said Court of Appeals of said judgment.

Enter

G. A. B., *J. S. C.*

(Endorsed:) Monroe Special Term, Nov. 9, 1907. Within Order granted on within date and ordered entered in Seneca County Clerk's Office. H. V. Woodward, Special Deputy Clerk.

(Endorsed:) Seneca County Clerk's Office. Filed and entered, Nov. 13, 1907. Herbert J. Feehan, Clerk.

62 Supreme Court, Seneca County.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y.,

vs.

FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee of Francis Bacon.

A judgment having been duly recovered in the above entitled action in favor of the plaintiff and against the defendant, in and by which was granted to the plaintiff and against the defendants the relief asked for in the complaint, being the reformation of the contract, as therein asked, and such judgment having been duly entered in the Seneca County Clerk's Office on the 30th day of October, 1905, and the defendant as trustee in Bankruptcy of Francis Bacon having appealed from the said judgment to the Appellate Division of the Supreme Court of the State of New York, in the Fourth Judicial Department, and the said Appellate Division having in all things affirmed the said judgment, and the said Appellant having thereupon appealed from the judgment of affirmance which was entered in the Seneca County Clerk's Office on the 22nd day of May, 1906, to the Court of Appeals of the State of New York, and the said Court of Appeals having in all things affirmed the said judgment of affirmance; and the remittitur from the said Court of Appeals having been transmitted to this Court, and by an order of this Court made
63 on the 9th day of November, 1907, the said remittitur and all the record and proceedings in the Court of Appeals in the said Case *here* been received into this Court and the said order having directed that all further proceedings be had in this Court and that judgment be entered pursuant to the order and remittitur.

Now, therefore, on motion of Hammond & Hammond, attorneys for plaintiff in this action, it is adjudged and decreed that the said judgment in favor of the plaintiff and against the defendant of Oct. 30, 1905, and the said judgment of affirmance entered in the Seneca County Clerk's Office May 22, 1906, on the decision of the Appellate Division, be and the same hereby are in all things affirmed and that the same shall in all respects stand in full force and effect.

And it is further ordered and decreed that the plaintiff recover of the defendant George E. Zartman as trustee in Bankruptcy his costs on this appeal which have been taxed and which amount to the sum of $108.10.

Nov. 13, 1907, at 1 o'clock, P. M.

HERBERT J. FEEHAN, *Clerk.*

(Endorsed:) Seneca County Clerk's Office. Filed and entered, Nov. 13, 1907. Herbert J. Feehan, Clerk.

64 STATE OF NEW YORK, SUPREME COURT.
Seneca County Clerk's Office, ss:

I, Herbert J. Feehan, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The First National Bank of Waterloo, N. Y., a corporation, plaintiff, *vs.* Francis Bacon and George E. Zartman as Trustee in Bankruptcy of Francis Bacon, defendants, and also of the opinion of the Court rendered therein, and also of the Remittitur of the Court of Appeals and of the Order and Judgment of the Supreme Court entered thereon, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the Village of Waterloo, Seneca County, New York, this 13th day of February, 1908.

[Seal Seneca County, N. Y.]

HERBERT J. FEEHAN,
Clerk of Supreme Court, Seneca County, New York.

65 Court of Appeals, State of New York.

No. —.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y., Plaintiff,
vs.
FRANCIS BACON and GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon, Defendant.

Petition for Writ of Error, Assignment, and Prayer.

Considering himself aggrieved by the final decision of the Court of Appeals in rendering judgment against him in the above entitled case, the defendant, George E. Zartman as Trustee in Bankruptcy of Francis Bacon, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of a bond for costs.

And the said George E. Zartman, as such trustee in bankruptcy of the said Francis Bacon, assigns the following errors in the records and proceedings of the said case.

The Court of Appeals of New York erred in holding and deciding that it had the power, after the bankruptcy of Bacon, to reform a written agreement made between plaintiff and Bacon several years prior to the bankruptcy of Bacon, so as to diminish the value of the interest which this defendant as said trustee had in certain property of said bankrupt at the time of his appointment as such trustee. Such power of said State Court was denied and drawn in question by this defendant upon the ground that it was repugnant to the provisions of the Bankruptcy Act of 1898, and in contravention thereof.

66 The said errors are more particularly set forth as follows:

The Court of Appeals of New York erred in holding and deciding:

First. That, in an action which was commenced several months after the bankruptcy of Bacon, it had the power to reform a written agreement made between plaintiff and Bacon several years prior to the bankruptcy of Bacon, so as to make said agreement a security for obligations which were not expressed in the original agreement, and so as to give plaintiff a specific lien upon certain specified property as a security for the payment to it of certain obligations for which it had no such lien under the terms of the original agreement, as it existed at the time of the adjudication of Bacon as a bankrupt and at the time of the appointment of this defendant as such trustee in bankruptcy.

Second. That it had such power to so reform said agreement, notwithstanding the fact that, prior to the adjudication of Bacon as a bankrupt, a judgment creditor had, by the appointment of a receiver in proceedings supplementary to execution against Bacon, obtained a specific lien upon the property described in the complaint in this action, and that such lien, so obtained by said judgment creditor prior to the adjudication of bankruptcy, was now vested in this defendant as such trustee.

Third. That said agreement so reformed shall be the real agreement, made by said parties at the date of the original agreement, which was several years prior to the said bankruptcy, and shall be binding upon the said parties and their respective assigns and all persons holding by, through or under them and especially upon the defendant George E. Zartman as trustee in bank-

67 ruptcy of said Francis Bacon; and that said judgment so reforming said agreement did not create any new lien.

Fourth. That the trustee in bankruptcy in this action is not entitled to protection similar to that which would be given to a *bona fide* purchaser for value.

Fifth. That the said judgment so reforming said agreement and making the same binding upon this defendant as such trustee did not contravene the provisions of the Bankruptcy Act of the United States of 1898, and was not contrary to the provisions of Section Sixty Seven of Said Act.

For which errors, the defendant, George E. Zartman as trustee in bankruptcy of Francis Bacon, prays that the said judgment of the Court of Appeals of the State of New York, dated October 1st, 1907, be reversed and a judgment rendered in favor of this defendant as such trustee and for costs.

GEORGE E. ZARTMAN,
Attorney for George E. Zartman, as
Trustee in Bankruptcy of Francis Bacon.

Let the writ of error issue upon the execution of a bond by George E. Zartman as trustee in bankruptcy of Francis Bacon to the First National Bank of Waterloo, in the sum of Five hundred Dollars.

Dated, January 21st, 1908.

R. W. PECKHAM,
Associate Justice of the Supreme Court
of the United States.

68 Supreme Court, United States.

GEORGE E. ZARTMAN, as Trustee in Bankruptcy of Francis Bacon, Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y., Defendant in Error.

KNOW All Men By These Presents, that we, George E. Zartman as trustee in bankruptcy of Francis Bacon, as principal, Leonard Story and Fred G. Stewart, severally of the village of Waterloo, Seneca County, New York, as sureties, are held and firmly bound unto the First National Bank of Waterloo, N. Y., in the sum of Five Hundred Dollars, to be paid to the said Bank, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated the 17th day of January, 1908.

Whereas, the above named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of New York.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

GEORGE E. ZARTMAN. [L. S.]
As Trustee in Bankruptcy of Francis Bacon.
LEONARD STORY. [L. S.]
FRED G. STEWART. [L. S.]

69 STATE OF NEW YORK,
County of Seneca, ss:

On this 17th day of January, 1908, before me, the subscriber, personally appeared George E. Zartman, Leonard Story and Fred G. Stewart, to me personally known to be the same persons described in and who executed the foregoing instrument, and to me severally acknowledged that they executed the same.

FREDERICK L. MANNING,
Notary Public.

STATE OF NEW YORK,
County of Seneca, ss:

Leonard Story and Fred G. Stewart, being severally duly sworn, each for himself, says: That he is a resident and a freeholder within the County of Seneca, New York, and is worth the penalty of the foregoing bond over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale upon an execution.

LEONARD STORY.
FRED G. STEWART.

Subscribed and sworn to before me this 17th day of January, 1908.

FREDERICK L. MANNING,
Notary Public.

I hereby certify that I am personally acquainted with the sureties in the foregoing bond, and that I would approve such bond, both as to its form, and as to the sufficiency of said sureties, if it were presented in any proceeding before me.

Dated January 17, 1908.

CHARLES A. HAWLEY,
Referee in Bankruptcy for the Western District of New York.

(Endorsed:) I hereby approve of the within Bond, both as to its form and as to the sufficiency of the sureties therein. Dated, January 21st, 1908. R. W. Peckham, Associate Justice of Supreme Court of United States.

(Endorsed:) Seneca County Clerk's Office. Filed and Recorded, February 13th, 1908. Herbert J. Feehan, Clerk.

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The First National Bank of Waterloo, New York, plaintiff, and Francis Bacon and George E. Zartman, Trustee in bankruptcy of Francis Bacon, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn

71 in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said George E. Zartman, Trustee in bankruptcy of Francis Bacon, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) Seneca County Clerk's Office. Filed February 13, 1908. H. J. Feehan, Clerk.

[Endorsed:] United States Supreme Court. George E. Zartman as Trustee in Bankruptcy of Francis Bacon, Plaintiff in Error, *vs.* The First National Bank of Waterloo, N. Y., Defendant in Error. Writ of error. Geo. E. Zartman, Att'y in Person, Waterloo, N. Y.

72 STATE OF NEW YORK, SUPREME COURT,
Seneca County Clerk's Office, ss:

I Herbert J. Feehan, clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 13th, 1908, in the matter of George E. Zartman as Trustee in Bankruptcy of Francis Bacon *versus* The First National Bank of Waterloo, N. Y.

1. The original Bond of which a copy is herein set forth.

2. A copy of the Writ of Error, as herein set forth, which has been filed in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in the village of Waterloo, Seneca County, New York, this 13th day of February, 1908.

[Seal Seneca County, N. Y.]

HERBERT J. FEENAN,
Clerk of Supreme Court of Seneca County, New York.

73 UNITED STATES OF AMERICA *ss:*

To The First National Bank of Waterloo, New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, wherein George E. Zartman, trustee in bankruptcy of Francis Bacon, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in

error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 21st day of January, in the year of our Lord one thousand nine hundred and eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court United States. George E. Zartman as Trustee in Bankruptcy of Francis Bacon, Plaintiff in Error, *vs.* The First National Bank of Waterloo, N. Y., Defendant in Error. Citation. Geo. E. Zartman, Att'y in Person, Waterloo, N. Y.

74 STATE OF NEW YORK,
County of Seneca, ss:

George E. Zartman, being duly sworn, says that he resides in the village of Waterloo in said County of Seneca, New York; that on the 28th day of January, 1908, at the Village of Seneca Falls, Seneca County, New York, he served the annexed Citation, Petition, Assignment, Prayer and Bond upon Hammond & Hammond, the attorneys for the defendant in error, by delivering to and leaving with Jasper N. Hammond, personally, one of the members of said firm of Hammond & Hammond, true copies of said Citation, Petition, Assignment, Prayer and Bond, and that he knew the said person so served to be one of the attorneys for the said defendant in error herein.

GEORGE E. ZARTMAN.

Sworn to before me this 13th day of February, 1908.

FRED. G. STEWART,
Notary Public.

75 UNITED STATES OF AMERICA,
State of New York, Supreme Court,
Seneca County Clerk's Office, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Seneca County, New York, this 13th day of February, 1908.

[Seal Seneca County, N. Y.]

HERBERT J. FEEHAN,
Clerk of Supreme Court of Seneca County, New York.

Endorsed on cover: File No. 21,019. New York Supreme Court. Term No. 74. George E. Zartman, trustee in bankruptcy of Francis Bacon, plaintiff in error, *vs.* The First National Bank of Waterloo, New York. Filed February 15th, 1908. File No. 21,019.

Argued by
GEO. E. ZARTMAN,
Waterloo, N. Y.

Office Supreme Court, U. S.
FILED.
NOV 26 1909
JAMES H. MCKENNEY,
Clerk.

No. 74.

Supreme Court of the United States

GEORGE E. ZARTMAN, AS TRUSTEE IN BANKRUPTCY OF FRANCIS BACON, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF WATERLOO, N. Y.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

Upon his own application, Francis Bacon was adjudicated bankrupt by the District Court for the Western District of New York on the 4th day of May, 1904, and on the 23rd day of May, 1904, George E. Zartman was appointed the trustee of said estate in bankruptcy. In his Schedules the bankrupt had stated that he was the owner of 253 shares of the capital stock of the First National Bank of Waterloo and of 461 shares of the capital stock of the Waterloo Wagon Company, Limited; that said stocks were held by the Exchange National Bank of Seneca Falls, N. Y., as security for certain obligations held by said Bank, and that after the claims of the Exchange National Bank were satisfied, the First National Bank of Waterloo had the balance of said stocks as security for obligations due to it.

In October, 1904, the said trustee presented to the Referee his petition, alleging that the assignment of said stocks to the said First National Bank of Waterloo was as security for the payment of the obligations of the Waterloo Wagon Company,

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Limited, which said Bank might hold; and that said Bank did not then have any obligations at all of the said Waterloo Wagon Company, Limited, and asked that said Bank be cited to show cause before the Referee why an order should not be made declaring that the said First National Bank of Waterloo had no claim or lien upon said stocks. Such Order to show cause was granted by the Referee, and upon the return day thereof, the Bank appeared and filed its answer, alleging that it had commenced an action in the Supreme Court, Seneca County, of the State of New York against said Bacon and his said trustee to reform the contract by which said stocks had been pledged to said Bank, so as to make them a security also for the individual obligations of said Bacon to said Bank, and asked that said proceeding before said Referee be dismissed upon the ground that said Referee had no jurisdiction to determine the question of the reformation of said contract and because an action for such reformation had then been commenced in the State Court, on the 17th day of October, 1904. The referee determined that he had no jurisdiction to determine the matter of the reformation of said contract, and dismissed the proceeding. The trustee answered in said action in the State Court. Bacon did not answer, but upon the trial appeared as a witness for the Bank.

The complaint in said action alleged that on Feb. 15th, 1902, said Bacon made an agreement with said First National Bank of Waterloo by which he agreed to transfer to said Bank said shares of stock as a continuing collateral security for the payment of all obligations of the said Wagon Company or himself to said Bank; but that in writing out said agreement, by the mutual mistake of the parties, certain words were omitted, so that the agreement as actually executed was security for the obligations of the Wagon Company only; the complaint further alleged the bankruptcy of Bacon, the appointment of his trustee, and that said mistake was not discovered by either the Bank or by Bacon until after the bankruptcy, and asked that said agreement be corrected and reformed so as to include words which would make it a security for the individual obligations of Bacon to the Bank, and annexed to the complaint were copies of the agreement as actually executed and as it would be if corrected as the Bank desired, showing changes in the same by the insertion of nine words, viz: "are transferred to and," "now existing or," and "or himself."

The answer of the trustee was a general denial of the allegations as to mistake, etc., and an allegation of the appointment of a receiver in proceedings supplementary to execution upon a judgment against Bacon prior to the bankruptcy, and that defendant trustee represented the rights acquired by said judgment creditor and receiver.

The action was tried by the Court without a jury. The Court found that there had been a mutual mistake in the writing out of the agreement, and that the plaintiff was entitled to have the agreement reformed by the insertion of the words as claimed in the complaint. The Court denied the motion of defendant trustee to dismiss the action upon the claims of the trustee that the adjudication of Bacon as a bankrupt prior to the commencement of this action constituted a complete bar to the recovery of any judgment herein; and that if any judgment were recovered in this action, it could not become in any way a lien upon the stocks described in the complaint, or could not in any way increase or change the lien upon said stock which the Bank had at the time of the adjudication of Bacon as a bankrupt; and that the rights and equities of the receiver of the property of Bacon appointed in proceedings supplementary to execution before his bankruptcy, which were now vested in the trustee, were superior to the rights and equities of the Bank.

No opinion was written by the trial Court. Judgment was entered in favor of the Bank, upon the decision of the Court. To said decision the trustee filed exceptions, and took an appeal from said judgment to the Appellate Division, Fourth Department, of the Supreme Court of the State of New York, where said judgment was affirmed with costs, with an opinion in which all the members of the court concurred. From that judgment an appeal was taken by the trustee to the Court of Appeals of the State of New York, by whom said judgment was affirmed with costs and without opinion, and the case remitted to the Supreme Court, where final judgment was entered upon said remittitur. Upon application of the trustee, this writ of error was granted by Justice Peckham of the Supreme Court of the United States.

Specifications of Errors.

1. That, in an action which was commenced several months after the bankruptcy of Bacon, the State Court erred in re-

forming a written agreement made between the Bank and Bacon several years prior to the bankruptcy of Bacon, so as to make said agreement a security for obligations which were not expressed in the orginal agreement, and so as to give the Bank a specific lien upon certain specified property as a security for the payment to it of certain obligations, for which it had no such lien under the terms of the original agreement, as it existed at the time of the adjudication of Bacon as a bankrupt and at the time of the appointment of his trustee.

II. That the State Court erred in reforming said agreement for the reason that, prior to the adjudication of Bacon as a bankrupt, a judgment creditor had, by the appointment of a receiver in proceedings supplementary to execution against Bacon, obtained a specific lien upon the property described in the complaint in this action, and that such lien so obtained by said judgment creditor prior to the adjudication of bankruptcy, was now vested in the trustee in bankruptcy.

III. That in said action, the State Court erred in adjudging that said agreement so reformed should be the real agreement made by said parties at the date of the original agreement, which was several years prior to the said bankruptcy, and should be binding upon the said parties and their respective assigns and all persons holding by, through or under them and especially upon the said George E. Zartman as trustee in bankruptcy of the said Francis Bacon; and that said judgment so reforming said agreement did not create any new lien.

IV. That the State Court erred in adjudging that the trustee in bankruptcy in this action is not entitled to protection similar to that which would be given a *bona fide* purchaser for value.

V. That the State Court erred in adjudging that the said judgment so reforming said agreement and making the same binding upon said trustee in bankruptcy did not contravene the provisions of the Bankruptcy Act of the United States of 1898, and that it was not contrary to the provisions of Section Sixty-seven of said Act.

Brief.

I.

The rights of the trustee in bankruptcy under the Act of 1898 were brought in question in this action.

The trustee in bankruptcy was made a defendant in this action, presumably for the reason that he had some rights to or interest in the property described in the complaint, which would be affected by the judgment prayed for in this action. The question of the rights of the trustee under the Bankruptcy Act was sufficiently raised by the motion of the trustee to dismiss this action, made at the commencement of the trial (page 7), and by his motion for a nonsuit at the close of plaintiff's case (page 22), and by his motion to dismiss at the close of the evidence (page 23).

II.

The interest, which the trustee in bankruptcy took in this property at the time of his appointment, could not be diminished by the judgment of the State Court in this action.

At the time of the appointment of this trustee, the Bank held this stock under an agreement which made it a security to the Bank for only the obligations of the Waterloo Wagon Company, Limited. (Schedule 1, page 5), and had so held it for more than two years. At the time of the bankruptcy the Bank did not hold any claim of any kind against the Wagon Co. (page 10). So that as the agreement stood at that time, the trustee took this stock free from any claim by the Bank upon it. But the Bank claims that it had a lien upon this stock for the individual obligations of Bacon, which were not expressed in that agreement as it was written in 1902, but which would be expressed if the words "or himself," were inserted in that agreement, as was proposed (Schedule 2, page 6). When the Court inserted these two words in this agreement, the interest of the trustee in this stock became subject to the lien of the Bank for such obligations as it held against Bacon individually; so that by the reforming of this agreement, the interest which the trustee had in this stock at the time of his appointment, as expressed in the original written agreement, has been diminished by whatever claims the Bank has against Bacon himself.

The theory upon which this agreement was reformed was the old principle that "equity regards that as done which ought to be done," and that, as both the Bank and Bacon testified that it was orally agreed that these stocks should be pledged for the obligations of Bacon, but that the words "or himself" were omitted by mutual mistake from the agree-

ment as it was written out, it would be doing equity to now insert those words; and as the bankruptcy court was a court of equity, such reformation of this agreement could not be opposed to the bankruptcy law or practice.

But it is submitted that such a reformation is in direct conflict with the provisions of the Bankrupt Act.

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Bankruptcy Act, Sec. 67, (a).

It would seem that this provision of the Bankrupt Act was made for just such a case as this. If Bacon had given security to the Bank by chattel mortgage, it would have been necessary to file such mortgage to make it valid as against creditors, and if it had not been filed until five months after the bankruptcy, it would not have been a lien against the estate in bankruptcy. But this security was given by pledge. These stocks were subject to a prior pledge, and the actual possession could not be delivered to this Bank. Bacon and the Bank made this written agreement to pledge to the Bank these stocks which could not be actually delivered. No lien could be created except by a delivery of the stocks, or by a written agreement transferring the same.

"Possession must uniformly accompany a pledge. The rights of the pledgee cannot otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, etc., which cannot be manually delivered, were the proper subject of pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; 'provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of debts'."

Wilson vs. Little, 2 N. Y. 446, 457.

To create a lien by pledge, there must be a delivery or written assignment of certain specified property as security for the payment of certain definite obligations.

"In order, however, that such a lien may arise, the agreement must deal with some particular property, either by identifying it, or by so describing it that it may be identified, and

must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for the obligation."

3 Pom. Eq. Jur. Sec. 1235.

The only obligations expressed in this agreement as it was written in February, 1902, were the obligations of the Wagon Company to the Bank; and it was for the payment of these only that this agreement created a lien. It was not necessary that this agreement should be filed to create a lien against creditors. By this agreement there was no security for the indebtedness of Bacon, because such are not expressed therein. It is of no consequence whether Bacon and the Bank agreed that such indebtedness of Bacon should be expressed therein. It was not so expressed. If Bacon had given the Bank a chattel mortgage, and it had been expressly agreed between them that it should be filed at once, but they did not file it, there would be no lien as against creditors, because the statute of New York expressly provides that a chattel mortgage not filed is void as against creditors, and this has been held to be the general creditors, and is not limited to creditors with judgment and execution.

Stephens vs. Perrine, 143 N. Y. 476.

And such rights of creditors may be enforced by a trustee in bankruptcy.

"Notwithstanding the fact that an unfiled chattel mortgage is valid as between the parties and that a trustee in bankruptcy succeeds only to the rights of his bankrupt, he is not thereby precluded from attacking a mortgage made by his bankrupt for a default in filing, since by section 67 of the Bankruptcy Act it is expressly provided that "claims which for want of record or for other reasons would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate."

Skilton vs. Coddington, 185 N. Y. 80.

Thus the application of section 67 (a) when relating to claims which are not valid liens on account of "want of record" has been determined. But it has not "been so clearly determined what are the "other reasons" for which claims may be held not to be valid liens. If the parties have put their agreement into writing, the usual rule should apply that the writing contains the entire agreement. And if the

agreement does not express a lien for certain obligations and it so remains for more than two years, and until after bankruptcy occurs, there is no lien for such obligations, for the very manifest reason that the written agreement does not so provide, and that would be as good a reason as any "other reason," why such claim should not be a lien against the bankrupt estate. And if after bankruptcy, a court of equity can reform such agreement by inserting into it a description of other obligations, because it was claimed the parties had so originally agreed, then it would seem equally possible for such a court to direct a chattel mortgage to be filed nunc pro tunc, because the parties had agreed that it should be filed immediately when made, but by some mistake, it had not been filed.

"The time of the filing of the petition for adjudication of bankruptcy is the 'dead line' separating the past and the future."

In re Mayer, 6 A. B. R. 117, 138. 108 Fed. 599, 608.

"It is the settled policy of American Bankruptcy legislation to establish a day of cleavage, both as to the dischargeable debts and as to the property. The date when the petition is filed is recognized as fixing the time when the bankrupt's discharge begins to operate, and also as determining what property passes to the trustee and through him to the creditors."

In re Pease, 4 A. B. R. 578.

The rights of all parties are to be adjusted as of the date of the filing of the petition. If a claim is not then a perfected lien, it cannot thereafter be made perfect.

"A creditor claiming a lien can do nothing to perfect it after proceedings in bankruptcy are commenced. If the lien is not then perfect, the creditor is prevented from obtaining it."

Goldman, Beckman & Co. vs. Smith, 2 A. B. R. 104, 107.

Under the Act of 1867, this Court said:

"The object of the law was evidently to prevent anyone procuring a lien after the filing of the petition who had not got it before. If the lien existed before the filing of the petition, it could be enforced in the bankruptcy court; but if it did not exist, the purpose of the law was to prevent it ever being

brought into existence by any proceeding whatever. If this were not so, as soon as it were known that the petition was filed the provisions of the law might be easily evaded. The main purpose which the bankrupt act seeks to accomplish is to distribute the property of the bankrupt equally among his creditors; and in order to do this, the creditor, who has not, when proceedings are begun, such a security as binds the property is prevented from obtaining it, and thus securing a preference over another creditor. The 14th section of the Bankrupt Law is not leveled at the mode of doing a thing, but at the thing itself. It was the object of this section to prevent the acquisition of any other lien than such as existed when the petition in bankruptcy was filed and any proceeding by which this is attempted is within the condemnation of the law."

Morgan vs. Campbell, 89 U. S. 796, 799.

The Bankrupt Act of 1867 did not contain any provision similar to Section 67 (a) of the Act of 1898.

"Under the present Bankrupt Act, the trustee takes the property of the bankrupt in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the Act."

Thompson vs. Fairbanks, 196 U. S. 516.

The Bank can enforce its lien as it existed before the filing of the petition of Bacon in bankruptcy. That lien was for the obligations of the Wagon Co. only. Before Bacon became bankrupt, he held these stocks subject to the equitable rights of the Bank to bring an action to reform this agreement so as to make it a lien for the obligations of Bacon to the Bank. But the trustee in bankruptcy did not take this stock subject to that equitable right. The Bank had not perfected such claim so as to make it an enforcible lien against either the bankrupt or his creditors, prior to the bankruptcy; and therefore such claim for such lien was not a valid incumbrance upon this property, and is therefore void as against the trustee by the positive provisions of section 67 (a).

"Where a mortgage, given in perfect good faith, by a Massachusetts debtor, is recorded only in the office of the Clerk of the City of Boston, where the debtor had his place of busi-

ness, the failure to record the mortgage in the place of his residence as required by the State law, must be treated as a total failure to record, and section 67 a applies and the mortgage is invalid as against the trustee in bankruptcy of the mortgagor."

Matter of Dudley S. McDonald, 21 A. B. R. 358.

"Sec. 67 a vitiates as liens 'all claims which for want of record or for other reasons' the bankrupt's creditors might have avoided as liens; that is, no secret liens or equities shall prevail against the trustee that were not good against the general unsecured creditors represented by the trustee. Sec. 67 d protects 'liens given or accepted in good faith and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice.' The liens thus saved are liens, not promises to give liens, not equitable claims, that what ought to have been done shall be considered done, but liens perfected according to law."

Security Warehousing Co. vs. Hand, 143 Fed. 32. 16 A. B. R. 49, 63.

This case was affirmed by the Supreme Court, 206 U. S. 415, and would seem to be a sufficient authority that the equitable claim of the Bank to have this agreement with Bacon reformed did not survive the bankruptcy, and that the State Court erred in directing such reformation as against the trustee in bankruptcy.

III.

The rights of the trustee in bankruptcy as now representing the receiver in proceedings supplementary to execution were not regarded by the State Court.

Prior to the bankruptcy of Bacon a receiver of his property was appointed in proceedings supplementary to execution, and duly qualified. (page 23).

"Upon the appointment and qualification of a receiver in supplementary proceedings, he takes the legal title to all the personal property of the judgment debtor, whether in his hands or in the hands of others, as of the date of the service of the order in supplementary proceedings, except as against purchasers in good faith, or a debtor who has paid his debt in good faith."

Wrede vs. Gilley, and Clark as Trustee. 132 A. D. 293. 21 A. B. R. 821.

Ward vs. Petrie, 157, N. Y. 301, 307.

The record does not show the date of the service of the supplementary order, but it was about two weeks prior to the date of the appointment of the receiver, the examination of the debtor having been had and notice of application for appointment of receiver having been given before the appointment of the receiver. The title therefore to these stocks had vested in the receiver about two weeks before the bankruptcy. This title in the receiver was obtained through legal proceedings and became null and void unless the court preserved the same for the benefit of the estate. Section 67 f. This provision of the Bankrupt Act seems to have been entirely ignored by the State Courts. The Appellate Division declared "The trustee took the bankrupt's property in the same condition and subject to the same liens as the bankrupt himself held it." (page 33).

While this Court has repeatedly held that such a statement of the rights of a trustee applies only where there are no specific liens.

Thompson vs. Fairbanks, 196 U. S. 516.

York Mnfg. Co. vs. Cassell, 201 U. S. 344.

"Where the bankrupt, more than four months prior to his bankruptcy, by an unrecorded contract, void under the State law as to lien creditors, sold and agreed to convey certain real estate, and after the levy of attachment upon the property within the four months' period, executed a deed in pursuance of the contract to convey, which deed was forthwith recorded, his trustee is entitled under the second clause of Section 67 f of the Bankrupt Act to be subrogated to the rights of the attaching creditors, and to enforce their attachment liens for the benefit of the bankrupt estate."

First Nat. Bank of Baltimore vs. Staake, 202 U. S. 141.

"The holder of an unfiled chattel mortgage was entitled to the proceeds of the sale of the chattels as against the mortgagor and his trustee in bankruptcy, if there were no judgment creditors. But if a judgment creditor had obtained a lien upon the property, the trustee in bankruptcy was subrogated to the rights of that judgment creditor and might

take away from the proceeds of sale an amount equal to the claim of that judgment creditor."

In re Economical Printing Co. 6 A. B. R. 616, 619. 110 Fed. 514.

The receiver in proceedings supplementary to execution had obtained not only a specific lien upon these stocks, but the actual legal title to the same prior to the bankruptcy; and if bankruptcy had not intervened, he would have sold them in satisfaction of the judgments of the creditor whom he represented. The Bankruptcy Court is clearly entitled to preserve the claims of this receiver to these stocks for the benefit of this estate in bankruptcy; and it was error for the State Court to reform this agreement and direct that the agreement as so reformed should speak as of the date of the original agreement and be binding upon this trustee.

IV.

The trustee in this action is entitled to the same protection that would be given to a bona fide purchaser for value.

If the receiver had not been appointed in the supplementary proceedings, and if Bacon had not become bankrupt, he could have sold these stocks to a bona fide purchaser for value and have given him a title to the same which would have been good as against this claim of the Bank. And when Bacon was adjudicated bankrupt, by the provisions of section 70 (5) the trustee became vested with that same interest in these stocks, which Bacon could have so sold to an innocent purchaser. And the Bank has no more right to maintain this action against the trustee, than it would have to maintain such an action against such an innocent purchaser.

"The liens could not have been maintained against a purchaser of the property for value without notice. In other words, this property is property that the bankrupt might have transferred free from these claims of liens to any purchaser not having notice; the trustee of the bankrupt estate stands in the position of a purchaser for value without notice."

In re J. B. Booth, 3 A. B. R. 574. 98 Fed. 975.

In re Thorpe, 12 A. B. R. 195.

See also Fourth St. Nat. Bank vs. Millbourne Mills Company's Trustee, 22 A. B. R. 442.

V.

The judgment reforming this agreement created a new lien; and both judgment and lien are void as against this trustee.

If the Bank now has any lien upon these stocks as security for the obligations of Bacon, it obtained such lien "through legal proceedings," which were not commenced until more than five months after the bankruptcy. The Bankrupt Act provides that judgments and liens obtained through legal proceedings at any time within four months prior to the filing of the petition, shall be null and void. There is no provision in the Act relating to judgments and liens obtained after the bankruptcy, for the reason that the Act does not contemplate that there can be any such liens or judgments obtained after bankruptcy. When the party is adjudicated bankrupt, he becomes financially dead. He cannot create any new liens upon his property, and the Bankrupt Act adjusts the rights of all the parties interested in his property as their interests appeared at the time of the adjudication. The rights of all parties are fixed as of the date of the adjudication. The liens upon the property may be likened to strings attached to it when the bankrupt brings it into the bankruptcy court. If the lien is valid, then it was firmly fastened to the property before the adjudication, and the creditor has only to enforce his lien, pull upon his string, and he can withdraw from the bankruptcy court sufficient property to satisfy his lien. But if his lien is defective, if at the time of the adjudication, his string is not fastened to the property, neither the creditor, nor the bankrupt, nor any court can fasten that string to the property so that it can withdraw such property from the bankruptcy court. And likewise, if at the time of the adjudication there are no obligations, due from the bankrupt to the creditor, attached to the other end of his lien string, then there is nothing that can draw any of this property back from the bankruptcy court. In this case, Bacon and the Bank appear to have attempted to attach two lien strings to this property, one for the obligations of the Wagon Co. and the other for the obligations of Bacon. At the time of the bankruptcy, there were no obligations of the Wagon Co. attached to the end of that lien string, and hence the Bank cannot withdraw any of this property with that one. The Bank has some obligations of Bacon attached to the end of the other lien string,

but when it attempted to pull upon it, the Bank discovered that the other end of that string was not fastened upon this property at all, that the obligations of Bacon himself were not mentioned in this agreement. Therefore the Bank brought this action to have the words "or himself" inserted in this agreement, and asked the court to take that lien string into the bankruptcy court and fasten it upon this property so that the Bank could then pull upon that string and withdraw some of this property to pay the individual obligations of Bacon. The State Court says that "no new lien was created by such judgment so reforming said agreement; the original lien was adjudicated and determined." It is respectfully submitted that the lien for the obligations of Bacon is an entirely separate lien from that for the obligations of the Wagon Co.; and that the reformation of this agreement made or created a lien for the obligations of Bacon which did not exist at the time of the bankruptcy; and that such lien and the judgment so creating it long after the bankruptcy are both void as against this trustee, and are not any lien upon this property.

VI.

The Judgment of the State Court reforming this agreement should be reversed with costs.

GEORGE E. ZARTMAN,
Trustee and Attorney in Person,
Waterloo, N. Y.

Office Supreme Court, U. S.
FILED.
DEC 9 1900
JAMES H. McKENNEY,

SUPREME COURT

OF THE

UNITED STATES.

GEORGE E. ZARTMAN, Trustee in Bankruptcy of Francis Bacon, Plaintiff in Error,

Against

THE FIRST NATIONAL BANK OF WATERLOO, N. Y., Defendant in Error.

No. 74.

BRIEF OF THE DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This case comes before this court on writ of error to the Supreme Court of the State of New York on petition of George E. Zartman, trustee in Bankruptcy of Francis Bacon, who was the defendant with Francis Bacon in a suit brought in the Supreme Court of the State of New York by the above named defendant in error, for the reformation of a contract which had been made in writing between the said Francis Bacon and the said First National Bank.

The case was tried in equity before a Justice of the Supreme Court of New York — Mr. Justice Robson — who decided in favor of the plaintiff and directed that the contract described in the complaint be reformed as prayed for. The judgment entered upon his decision was unanimously affirmed by the Appellate Division in the Fourth Department (113 A. D. 612) and on appeal to the Court of Appeals the decision of the Appellate Division was unanimously affirmed (189 N. Y. 533).

The facts of the case are very simple and within a small compass.

For a number of years prior to and for several years after the date of the written contract made between the parties, Francis Bacon was the president of The First National Bank of Waterloo, N. Y., and also of The Waterloo Wagon Company. His

active work was at the office of The Waterloo Wagon Company, while the business of The First National Bank was looked after by the cashier, Mr. Herbert R. Becker. Prior to and at the time of the written contract which is sought to be reformed in this action, The First National Bank of Waterloo was extending credit to The Waterloo Wagon Company and also to Mr. Bacon, individually, by discounting the business paper of the former, endorsed by Mr. Bacon, and by loaning money to Mr. Bacon individually, and taking his notes for the same.

The official examiner of the bank had observed these liabilities of the Wagon Company and Mr. Bacon on the occasions of his examinations of the bank and called attention to the fact that additional security ought to be obtained. Mr. Bacon was spoken to on the subject and the matter was also discussed by the Board of Directors of the Bank. During the time of this discussion The Exchange National Bank of Seneca Falls, N. Y., held by an assignment from Mr. Bacon 461 shares of the capital stock of The Waterloo Wagon Company and 253 shares of the Stock of The First National Bank of Waterloo as a continuing collateral security for the payment "to it of any indebtedness or liability of any kind, absolute or contingent, due or not due, *now existing or that may hereafter exist*, arise accrue, or be contracted on the part of *himself* or of The Waterloo Wagon Company, Limited, to said bank," and it was agreed between Mr. Bacon, in his capacity as an individual, and Mr. Herbert R. Becker, as cashier of the Bank, that he should give to the Bank an assignment of all these shares of Waterloo Wagon Company Stock and bank stock, as a continuing collateral security for all the obligations and liabilities owing by him, or by The Waterloo Wagon Company to the Bank, at that time or at any time in the future As Mr. Bacon said in his testimony at Folio 8, "I agreed to give to him the securities which were held by the Exchange National Bank upon the same conditions which I gave them, to them. These conditions were, they were to cover the obligations of The Waterloo Wagon Company and also my own individual obligations, &c."

Mr. Bacon dictated the agreement to his stenographer and in such dictation or in writing it out the above words in italics were unintentionally omitted.

The fact that Mr. Bacon was at that time the President of The National Bank, makes strongly in favor of the claim of the

plaintiff in this action. He being an officer of the bank and borrower from it at the same time, was more than ordinarily bound to see that the personal accommodation received by him from the bank was promptly and adequately protected. He owed more of duty in that respect than would be owing by an unofficial customer of the bank.

STATEMENT OF LAW.

I.

No Federal question is involved in this case.

If the question arising had been, whether or not the title that Mr. Bacon had to certain property would pass to his assignee, under the operation of the Bankruptcy Act, a Federal question would arise. When the question is whether Mr. Bacon had title to certain property, that question was solely for the State Court and its decision upon that question is not reviewable in this court.

Scott vs. Kelley, 22 Wall 57
Long vs. Converse, 91 U. S. 105.
McKenna vs. Simpson, 129 U. S. 56

II.

No Federal question is involved in this case that will sustain a writ of error to a State Court.

The only question involved in the State Court was the exercise of the equitable jurisdiction of that Court to correct the mutual mistake of two parties made in the transcription of a contract. This power has been exercised continuously by the old Court of Chancery and its successor, the Equity branch of the Supreme Court of the State of New York for more than a century.

The remark in the opinion of the Court in the case of Chapman vs. Bowen, 207, U. S. 89, in a case involving this same principle, is pertinent and applicable to the case in hand:

> "The decision below proceeded on well settled principles of general law, broad enough to sustain it without reference to provisions of the Bankruptcy Act.

III.

If the Court shall consider this a proper case for review, there is but one question that can be considered, and that is whether a Court of Equity is prohibited from entertaining an action for

the reformation of a contract in a case where one of the parties to such action may have been adjudged a Bankrupt. In another form the question might be, whether the Bankruptcy law suspends that important branch of Equity Jurisprudence which has to do with the correction of mistakes in written instruments caused by the oversight or carelessness of the parties thereto or their scriviners.

The plaintiff in error in this case claims that the decision of the State Court is erroneous in that it allows the reformation of a contract between Bacon and the plaintiff that was made some time prior to the adjudication of the former as a bankrupt. The position of the trustee in Bankruptcy is in this case, that the mistake made by Mr. Bacon in dictating or writing out the contract between himself and The First National Bank is an asset in his hands as a part of the estate of the bankrupt.

The trustee claims that he takes the same kind of title as a bona fide purchaser for value.

The rule applicable to this case and to all similar cases is, that the trustee takes the property of the bankrupt not as an innocent purchaser would, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities.

Winsor vs. McClellan, 2 Story; 492; Fed. Cas. No. 17887.
Donaldson vs. Farwell, 93 U. S. 631.
Casey vs. La Societe de Credit Mobilier, 2 Wood 777; Fed. Cas. No. 2496.
Stewart vs. Platt, 101 U. S. 731.
In re N. Y. Economical Printing Co., 6 Am. Bk. Reps. 615.
Yeatman vs. New Orleans Sav. Inst., 95 U. S. 764.
Thompson vs Fairbanks, 196 U. S. 516.

An attaching creditor is not a *bona fide* purchaser.

Sargent vs. Sturm, 23 Col. 359.
Thompson vs. Rose, 16 Conn. 71.
Oswego Starch Factory vs. Lendrum, 57 Iowa 573.
Amer. Mer. Union Ex. Co. vs. Willsie, 79 Ill. 92.
Jordan vs. Parker, 56 Me. 557.
Thaxter vs. Foster, 153 Mas. 151.
Naugatuck Cutter Co. vs. Babcock, 22 Hun. 481.
Mowrey vs. Walsh, 8 Cow. 245.
Devoe vs. Brandt, 53 N. Y. 462.
Bradley vs. Olear, 10 N. H. 477.
Poor vs. Woodburn, 25 Vt. 234.

Assignee for benefit of creditors is not a *bona fide* purchaser.

Wailes vs. Couch, 75 Ala. 134.
Belding vs. Frankland, 8 Lea. (Tenn.) 67.

Farley vs. Lincoln, 51 N. H. 579.
Ratcliffe vs. Sangston, 18 Md. 383.
Bussing vs. Rice, 2 Cush. (Mass.) 48.

An assignee in Bankruptcy is not a *bona fide* purchaser.

Donaldson vs. Farwell, 93 U. S. 631.
Montgomery vs. Bucyrus Mach. Wks., 92 U. S. 257.

IV.

The principle that Courts of Equity will decree the correction of errors in written instruments which have been caused by mistakes, &c., is nowhere more strongly upheld than in the United States Courts.

Hunt vs. Rousmanier, 1 Pet. 1.
Same vs. Same, 8 Wheat 174.
Ivinson vs. Hutton, 98 U. S. page 79 (Oct. Term, 1878).
Walden vs. Skinner, 101 U. S. 577—Oct. 1879.
Elliott vs. Sackett, 108 U. S. 132— " 1882.
Adams vs. Henderson, 168 U. S. 573 (October Term, 1897.)

The Court says in its opinion in the Ivinson case as follows:

"Reported cases of the highest authority decide that Courts of Equity possess the power to correct mistakes in written instruments, even to the extent of changing the most material stipulations they contain and which are the subjects of special agreement; but the settled rule of practice is that the power should always be exercised with great caution, and only in cases where the proof is entirely satisfactory. Finley vs. Lynn, 6 Cranch 249: Oliver vs. Ins. Co. 2 Curt. (C. C.) 295."

"Where an instrument is drawn and executed, which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfill the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the antecedent agreement of the parties. Hunt vs. Rousmanier, 8 Wheat 211: S. C. 1 Pet. 13."

"Proof of the most unquestionable character is exhibited in the record, that the understanding of the parties was that the respondent was to pay to the complainant the whole amount the latter paid into the firm, less the sums he had drawn out, and that the clerk designated by the parties to examine the books and compute the amount made the mistake alleged in the bill of complaint. Clear

proof is also exhibited that corresponding mistakes were made in the writings executed between the parties to affect the agreed dissolution of the Copartnership. Under such circumstances, equity, if the proof is clear, will reform the agreements and correct the mistakes, as appears by many standard authorities in addition to those to which reference has already been made. Henkle vs. Ins. Co., 1 Ves. 317; Motteux vs Ins. Co., 1 Atk. 545 Collett vs. Morrison, 12 Eng. L. & E. 171; Andrews vs. Essex Co., 3 Mas. 10.

The Court says in its opinion in the Adams case above:

"That a Court of Equity has power to correct this mutual mistake, make the instruments given upon execution of the contract conform to the real intention of the parties, as established by clear and convincing proof, and hold the parties to their actual agreement, cannot be doubted."

V.

We submit that the argument of counsel based upon decisions of various courts as to the invalidity of chattel mortgages for want of filing, is not pertinent to the question involved in this case. The essential question involved in the discussions relating to chattel mortgages is the question of lack of record—the omission to file the security as the statute requires. Chattel mortgages and the filing of them were intended as a convenience to debtors and creditors to take the place of the actual change of possession under the older form of bill of sale as security. This matter of record was introduced to avoid the fraudulent practices obtained under the older form of bill of sale, and therefore the matter of record or filing is of paramount importance. The Statute requires the matter of filing as a means of avoiding fraudulent practices. The Statute declares the paper to be void for want of such filing. The cases cited by the plaintiff in error have arisen by reason of failure of parties to comply with the express provisions of the Statute.

There is no provision whatever in any Statute, either State or National, which connects the question involved in this case with any rule or regulation concerning the filing or recording of any paper whatever. No such question is here in any form.

Counsel cites Section 67 (a) of the Bankruptcy Act in regard to "claims which for want of record, &c." In the first place

this case does not involve the doctrine or question of "claims" against any estate in Bankruptcy. Neither does it involve any question of "record."

Counsel for plaintiff in error is so carried away with his argument based upon the rule touching the omission to file chattel mortgages, that he is led to the ridiculous extent of comparing the reformation of a contract by a Court of Equity to correct mutual errors made by the parties, with the idea of filing a chattel mortgage nunc pro tunc, The error on the part of Counsel is, that in one case the omission to perform a statutory duty in regard to filing chattel mortgages as presented in an action at law involving the same, and the powers of a Court of Equity to reform a written contract on the ground of the mutual mistake of the parties, are not matters that can be compared. They are not in the same class and are not controlled by the same rules and principles. Counsel's argument carries him to the point almost of claiming, that an action could not be maintained against the bankrupt or his trustee in bankruptcy to prove that the bankrupt did not have title to certain property that might be found among his assets at the time of his adjudication. It is too well established to require discussion that questions of this character are very proper matters for disposition by the proper tribunals, and that such questions are being raised and disposed of with frequent occurrence.

In view of the amendment of the Bankruptcy Act in 1903, giving State Courts concurrent jurisdiction, and in view of the fact that the trustee joined issue and litigated fully all the questions in the State Court, the decision there made should be final.

The Judgment of the State Court should be affirmed with costs.

W H. SHOLES,

Washington, D. C.

HAMMOND & HAMMOND,

Seneca Falls, N. Y.

For Defendant in Error.

ZARTMAN, TRUSTEE IN BANKRUPTCY, *v.* FIRST NATIONAL BANK OF WATERLOO.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 74. Argued January 12, 1910.—Decided February 21, 1910.

The jurisdiction which equity has to decree correction of errors in written contracts caused by mutual mistake is not suspended by the bankruptcy law; and the trustee takes property as the debtor had it at the time of the petition subject to all valid claims, liens and equities, including the power of a court of equity to correct manifest error by mutual mistake in an agreement made prior to the petition.

Where a contract is reformed to correct a mutual mistake and make it conform to the intent of the parties a new lien is not created, but the original lien is adjudicated and determined.

189 N. Y. 533, affirmed.

THIS was a suit brought in the Supreme Court of the State of New York by the First National Bank of Waterloo against Francis Bacon and George E. Zartman, as Bacon's trustee in bankruptcy, to procure the reformation of a written contract made by plaintiff and defendant Bacon February 15, 1902.

Before the contract was made, Bacon was president of the First National Bank of Waterloo, New York, and also of the Waterloo Wagon Company. He was active in the office of the Wagon Company, while the business of the bank was looked after by its cashier Becker. The Waterloo Bank had extended credit to the Wagon Company and to Bacon individually, discounting paper and taking notes.

The Exchange National Bank of Seneca Falls, New York,

held, by assignment from Bacon, 461 shares of the stock of the Wagon Company and 253 shares of the Waterloo Bank, as continuing collateral security for any existing or future indebtedness of Bacon or the Wagon Company.

The contract between Bacon and the Waterloo Bank provided that the shares were "to be held by said bank as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, due or not due, now existing or that may hereafter exist, arise, accrue or be contracted, on the part of himself or of the Waterloo Wagon Company Limited, to said bank, and the said Francis Bacon hereby agrees with the First National Bank of Waterloo that the said certificates of stock above named *are transferred to and* may be held by the said First National Bank of Waterloo as a continuing collateral security for the payment to it of any indebtedness or liability of any kind, absolute or contingent, *now existing or* that may hereafter exist, arise, accrue or be contracted on the part of the Waterloo Wagon Company Limited, *or himself*, to said bank and said shares of stock upon their surrender by the Exchange National Bank shall be deposited with the said First National Bank of Waterloo."

The words in italics were omitted from the contract by mutual mistakes made in preparing and executing it, and the New York Supreme Court, by its decision, reformed the contract by inserting them. In the meantime, however, Bacon had become a bankrupt, having been so adjudicated May 4, 1904, and defendant Zartman had been appointed trustee.

This action was begun October 17, 1904. The trustee alone defended.

The judgment was unanimously affirmed by the Appellate Division of the Fourth Department, 113 App. Div. 612, and on appeal to the Court of Appeals the decision of the Appellate Division was unanimously affirmed without opinion. 189 N. Y. 533. The remittitur was filed below November 9, 1907, and this writ of error was thereupon allowed.

Mr. George E. Zartman pro se for plaintiff in error:

The interest which the trustee took could not be diminished by the action of the court; reformation of the contract would be in direct violation of the bankrupt act. Under § 67*a* claims which for want of record or for other reasons could not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

No lien in this case could be created on the stock affected except by delivery, and there was no delivery in this case. *Wilson* v. *Little*, 2 N. Y. 446, 457; 3 Pom. Eq. Jur., § 1235; *Stephens* v. *Perrine*, 143 N. Y. 476; *Skilton* v. *Coddington*, 185 N. Y. 80.

The day the petition is filed separates past and future as to liens and as to when rights of parties are to be adjusted. *Re Peare*, 4 Am. Bk. Rep. 578; *Goldman* v. *Smith*, 2 Am. Bk. Rep. 104; *Morgan* v. *Campbell*, 22 Wall. 381; *Thompson* v. *Fairbanks*, 196 U. S. 516; *Re McDonald*, 21 Am. Bk. Rep. 358; *Security Co.* v. *Hand*, 143 Fed. Rep. 32, aff'd 206 U. S. 415.

The rights of the trustee as representing the receiver were not regarded by the state court. The receiver took the legal title.

The trustee is entitled to the same protection as a *bona fide* purchaser for value. *Re Book*, 98 Fed. Rep. 975; *Re Thorpe*, 12 Am. Bk. Rep. 195; *Fourth Street Bank* v. *Milbourne Mills*, 22 Am. Bk. Rep. 442.

The judgment reforming the contract created a new lien, and both judgment and lien are void as against the trustee.

Mr. W. H. Sholes for defendant in error:

The bankruptcy law does not suspend the important branch of equity jurisprudence which has to do with the correction of mistakes in written instruments caused by the oversight or carelessness of the parties thereto or their scriveners.

Plaintiff in error claims that the mistake made in dictating or writing out the contract is an asset in his hands as a part of

the estate of the bankrupt and that he takes the same kind of title as a *bona fide* purchaser for value. This is error, for the rule is, that the trustee takes the property of the bankrupt not as an innocent purchaser would, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities. *Winsor* v. *McClellan*, 2 Story, 492; *Donaldson* v. *Farwell*, 93 U. S. 631; *Casey* v. *La Societe de Credit Mobilier*, 2 Wood, 777; *Stewart* v. *Platt*, 101 U. S. 731; *Re N. Y. Economical Printing Co.*, 6 Am. Bk. Rep. 615; *Yeatman* v. *New Orleans Sav. Inst.*, 95 U. S. 764; *Thompson* v. *Fairbanks*, 196 U. S. 516.

An attaching creditor is not a *bona fide* purchaser. *Sargent* v. *Sturm*, 23 Colorado, 359; *Thompson* v. *Rose*, 16 Connecticut, 71; *Oswego Starch Factory* v. *Lendrum*, 57 Iowa, 573; *American Union Ex. Co.* v. *Willsie*, 79 Illinois, 92; *Jordan* v. *Parker*, 56 Maine, 557; *Thaxter* v. *Foster*, 153 Massachusetts, 151; *Naugatuck Cutter Co.* v. *Babcock*, 22 Hun, 481; *Mowrey* v. *Walsh*, 8 Cow. 245; *Devoe* v. *Brandt*, 53 N. Y. 462; *Bradley* v. *Olear*, 10 N. H. 477; *Poor* v. *Woodburn*, 25 Vermont, 234.

An assignee for benefit of creditors is not a *bona fide* purchaser. *Wailes* v. *Couch*, 75 Alabama, 134; *Belding* v. *Frankland*, 8 Lea (Tenn.), 67. *Farley* v. *Lincoln*, 51 N. H. 579; *Ratcliffe* v. *Sangston*, 18 Maryland, 383; *Bussing* v. *Rice*, 2 Cush. (Mass.) 48.

Nor is an assignee in bankruptcy a *bona fide* purchaser. *Donaldson* v. *Farwell*, 93 U. S. 631; *Montgomery* v. *Bucyrus Mach. Works*, 92 U. S. 257.

That courts of equity will decree the correction of errors in written instruments which have been caused by mutual mistakes has nowhere been more strongly upheld than in the United States courts. *Hunt* v. *Rousmanier*, 1 Pet. 1; *Same* v. *Same*, 8 Wheat. 174; *Irinson* v. *Hutton*, 98 U. S. 79; *Walden* v. *Skinner*, 101 U. S. 577; *Elliott* v. *Sackett*, 108 U. S. 132; *Adams* v. *Henderson*, 168 U. S. 573.

There is no provision whatever in any statute, either state

or national, which connects the question involved in this case with any rule or regulation concerning the filing or recording of any paper whatever. No such question is here in any form.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

The jurisdiction in equity to decree the correction of errors in written contracts which have been caused by mutual mistake is firmly established and needs no citation of authority to sustain it. In the present case the evidence of the mistakes in question was undisputed. We are not aware that the bankruptcy law has suspended that jurisdiction.

The position of the trustee in bankruptcy seems to be that the mistake made by Bacon in dictating or writing out the contract between himself and the Waterloo Bank "is an asset in his hands as part of the estate of the bankrupt," but we cannot agree to that. The trustee claims that he takes the same kind of title as a *bona fide* purchaser for value, but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities. *Thompson* v. *Fairbanks*, 196 U. S. 516, and cases cited. And this is so well settled that our jurisdiction of the writ of error is exceedingly doubtful. Judge Williams, speaking for Appellate Division, Fourth Department, treated of this point thus (113 App. Div. 612, 615):

"It is said that the bankruptcy of Bacon constituted a bar to the relief granted in this action. This cannot be true. The trustee took the bankrupt's property in the same condition and subject to the same liens as the bankrupt himself held it. The trustee is in no sense a *bona fide* purchaser for value, and entitled to protection as such. No new lien was created by the decision and judgment appealed from. The original lien was adjudicated and determined."

We concur in this view, and the judgment is *Affirmed.*